IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT BY THE COUNCIL ON ENVIRONMENTAL QUALITY

HEARING

BEFORE THE

SUBCOMMITTEE ON TOXIC SUBSTANCES AND ENVIRONMENTAL OVERSIGHT

OF THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

UNITED STATES SENATE

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IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT BY THE COUNCIL ON ENVIRONMENTAL QUALITY

WEDNESDAY, JULY 21, 1982

U.S. SENATE, COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, SUBCOMMITTEE ON TOXIC SUBSTANCES AND ENVIRONMENTAL OVERSIGHT,

Washington, D.C.

The subcommittee met at 2:30 p.m., in room 4200, Dirksen Senate Office Building, Hon. Slade Gorton (chairman) presiding.

Present: Senator Gorton.

OPENING STATEMENT OF HON. SLADE GORTON, U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator GORTON. We will call the meeting of the Subcommittee on Toxic Substances and Environmental Oversight to order, and we will start with Mr. Hill, Chairman of the Council on Environmental Quality. Before we do so, let me announce we plan to take testimony from several witnesses, including Mr. Hill, on the implementation of the National Environmental Policy Act by the Council on Environmental Quality.

NEPA was passed by Congress in 1969. Since that date the Council on Environmental Quality, created by the act, has had as its primary activity the overseeing of Federal agency implementation of the act's environmental impact statement requirements. Pursuant to an Executive order, the Council promulgated, in 1978, regulations designed to streamline the environmental review process which had developed in the various Federal agencies since the inception of the environmental impact statement requirements. These regulations became effective for the majority of the Federal agencies on July 30, 1979. During the past year the Council has requested to receive testimony in respect to these regulations to insure their continued operability and application.

This hearing was called to allow the Council to report to the Congress on the results of that review process and to discover necessary amendatory intentions on the part of the Council.

With that, Mr. Hill, we will be delighted to hear your testimony.

STATEMENT OF A. ALAN HILL, CHAIRMAN, COUNCIL ON ENVIRONMENTAL QUALITY, ACCOMPANIED BY NANCY NORD, GENERAL COUNSEL, COUNCIL ON ENVIRONMENTAL QUALITY

Mr. HILL. Thank you, Mr. Chairman. I have a full statement that I would ask to be made part of the record. I will hit the highlights.

Senator GORTON. Please do so. And since we have just been called to a rollcall, if you can keep that summary to 5 minutes or so, we will have a natural breaking point.

Mr. HILL. Thank you.

My name is A. Alan Hill. I am Chairman of the President's Council on Environmental Quality. It is a pleasure to be with you today to review our activities during the past year, and more specifically our review of the NEPA process.

As you stated, the Council was established by the Environmental Policy Act, which spelled out very broadly what our statutory mission is. Additional duties were assigned to the Council by Executive Order 11991 which directed CEQ to issue regulations to the Federal agencies for implementing the procedural requirements of the act.

Although the staff and budget of the Council is less in fiscal 1982 than it has been in past year, the Council has been fully able to carry out its statutory responsibilities.

As Chairman of the Council, I am a member of the Cabinet Council on Natural Resources and Environment and fully participate in those deliberations.

As you know, we have just released copies of the 1981 Annual Report of the Council, which contains a full description and analysis of environmental conditions in our country. Additionally, we published this year a document entitled "Environmental Trends," and are looking forward to publishing it again in approximately 5 years. We also published a document entitled "NEPA in Action," which studied the operation of 19 different Federal agencies and the NEPA offices therein. A complete list of the studies published by CEQ in the last year is attached to my statement.

We have also been engaged in what we refer to as an outreach effort. In the earlier hearings, some concern was expressed with regard to whether we are meeting with and discussing with and debating with the environmental community various actions of the administration. And the answer is yes. We have tried to do a balanced job of listening to any representative of the public, business community, the environmental community, who has something to offer to the Council, and we have tried to do—I think bent over backward.

In the hearing at the Appropriations Committee this year, I was asked what the schedule is like over a period in the past which would reflect this effort toward balance, and I think, out of a hundred meetings, approximately 40 were with environmental organizations, 40 were business community representatives, and approximately 20 were academic and other types of institutions.

Finally, we have been devoting a considerable amount of our time to overseeing the manner in which the Federal Government is complying with the NEPA law. The vast majority of Federal agencies now have in place NEPA procedures. Some agencies, a number of them, are now revising their NEPA procedures to see if they can be further refined.

Earlier the Vice President's Regulatory Reform Task Force requested the public's help in identifying overly burdensome regulations. During the review process the CEQ regulations were not identified as imposing undue regulatory burdens. In fact, letters of support for the regulations were received.

Last summer we asked for public comments on how various Federal agencies were implementing the CEQ regs for writing environmental impact statements. The specific questions we posed and a summary of the answers received are attached to my statement.

There are some problem areas which the Council needs to address. We are going to be developing guidance for the Federal agencys on how to solve some of the problems identified in the comments. Specifically, we are going to be looking to improvements in the techniques for identifying issues to be analyzed in an EIS; we are going to try to develop an appropriate analysis of alternatives in permitting situations as opposed to situations in which the agency is undertaking activity at its own initiative; agency adoption of analysis done by other Federal and State agencies; ways to reduce repetitious analysis in environmental documents; finally, the circumstances in which an agency may charge an applicant for environmental impact preparation.

Other guidance may be developed as we move through this process. I want to emphasize, however, that unless new problems are brought to our attention, we do not plan to substantially amend the CEQ regulations.

The Council will be holding a public meeting on August 12 of this year to hear the views of any interested person. We will be developing guidance documents after that public meeting. I would, certainly, appreciate any input from members or staff of this committee during that process.

At this point the administration does not intend to request that the Congress amend the NEPA Act. Any substantial revision is simply not warranted at this time. NEPA does not require an agency make the most environmentally sound decision, but rather that environmental considerations be integrated into the decisionmaking process. The agencies have now had over a decade of experience with the statute. I believe that most are now finding the NEPA process a useful planning process.

Thank you. I am ready for questions.

Senator GORTON. Your written statement that any substantial revision of NEPA is simply not warranted at this time indicates you are not advocating any amendment at all. Does that indicate your opinion that NEPA is working?

Mr. HILL. Yes; I believe the NEPA process is working and well.

Senator GORTON. And as a consequence, not only is not statutory change indicated but no significant changes in your regulations or guidelines are indicated either?

Mr. HILL. No major changes, that is correct. We have had some minor amendment requests that we will be considering, but nothing that goes to the major side of amending the regs.

Senator GORTON. I assume, Mr. Hill, that you are aware of the District of Columbia Court of Appeals decision in the case of *People Against Nuclear Energy* v. *NRC.*

Mr. HILL. Yes; I am.

Senator GORTON. What is your opinion about the requirement that psychological stress be considered in the consideration with the environmental analysis required by NEPA, and do you think any current action by Congress is indicated?

Mr. HILL. First of all, I don't feel the decision is a very good one. In fact, it is a very poor decision. The Department of Justice is considering and I believe will be appealing that decision to the Supreme Court. I think at the time we have a decision from the Supreme Court, in other words have exhausted that route, if legislative action is needed, that would be the time for that legislation.

Senator GORTON. You do not think that any legislative action is indicated until the appeal process is exhausted?

Mr. HILL. Yes; until we run that course.

Senator GORTON. We are going to have to suspend now for 15 or 20 minutes. I do have a few more questions for you, so if you will remain we will ask those and then go on to the next witnesses.

[Brief recess.]

Senator GORTON. The committee will come back to order.

As you pointed out, Mr. Hill, your annual report for 1981 has just been printed and delivered to us, and is a most interesting and impressive document. My staff did come up with one question from one of the tables, however, which indicated a very sharp drop in environmental impact statements prepared by Federal agencies between 1976 and 1980. As a matter of fact, it is quite a sharp drop between 1979 and 1980. And that is on page 260. Obviously, it has nothing to do with the change in administration; we are dealing with reports within the same administration. Do you have any idea of the reason for that drop?

Mr. HILL. I would assume that there are fewer projects going forward.

If I may, Senator, let me ask Nancy Nord, our General Counsel, to join me here and see if we can shed some more light on this.

Ms. NORD. Of course, the list was prepared for CEQ by EPA which logs and houses the environmental impact statements which are filed by the Federal agencies. One possible explanation for the drop in the numbers is the fact that a number of projects were started in the early seventies, but they are long-range projects so the projects are just now being completed, or have not yet been completed but the environmental impact statements would have been filed in the early years as the project was in its developmental stage.

Senator GORTON. Have there been more exemptions granted over the years?

Ms. NORD. No; there have not been more exemptions granted over the years. NEPA, of course, doesn't encompass the exemption concept; instead we talk about categories of action which are not subject to NEPA, that is, they are not major Federal actions significantly impacting the human environment. As agencies become more used to the statute, they are a bit more sophisticated in pinpointing what is a major Federal action as opposed to what is not.

Mr. HILL. On that general theme, Mr. Chairman, the U.S. Forest Service recently amended their NEPA regulations and added to the list of categorical excluded activities, and one of the activities they excluded from the NEPA process was the siting of beehives. It is on that order of change. Now that gets us out of something that is environmentally not a major Federal action.

Senator GORTON. In my neighborhood I suspect it might be. I am not sure of others.

Mr. Hill, the annual report certainly includes a large number of different subject matter issues. It is very broad in that respect. I do note, however, that either without exception or almost without exception the report confines itself to explaining the background of the issue itself and avoids carefully stating any policy position, recommendation by CEQ, or a statement of the position of the administration. I assume that must have been a conscious choice. Was it? Does the Council on Environmental Quality make declarations of the administration policy on any or all of the issues discussed in this report?

Mr. HILL. We have not, in general. There are places, for instance, where we talk about the marketplace as another mechanism to achieve environmental quality. We have stated a sincere interest and a recommendation that we move toward greater use of user fees for such things as the construction of dams, and so forth. So, we haven't consciously avoided taking a position on all the issues. We have tried to end each of the chapters or section of the report with a consideration of what we feel are future issues that deserve some attention.

Senator GORTON. But still, simply outlining what they are rather than a recommended direction.

Mr. HILL. That is correct.

Senator GORTON. And that is a conscious choice. That is your view of the proper functioning of the Council, I take it.

Mr. HILL. Yes.

Senator GORTON. Back when we had your confirmation hearing, you identified several areas in which alterations might be made in the CEQ NEPA category process, scoping process, the referral process, and the requirements to cooperate with State and local government agencies. Now you seem to indicate that no significant changes in guidelines are necessary. Am I correctly stating your position, and does that result from the public comment process in which the Council has engaged?

Mr. HILL. What I was trying to reflect in the quick review of my statement, and as is more clearly spelled out in my formal statement, is there has been no overwhelming demand to amend the regulations themselves. We are looking to preparing what we call agency guidance. These are circular letters going to all the agencies of the Federal Government to improve certain areas and, of course, the first time I listed on that brief list was improving the handling of the scoping process. It appears to me that, as the scoping process being the first step in preparing of an environmental document, if scoping is handled better, handled better in terms of being more artful, more open, involving interested people, members of the public, the entire process tends to flow more smoothly. So, that is one area we want to concentrate in in the development of some guidance to the agencies, looking to some improvement in their handling of the parts of the process. But it is not amending the regulations.

Senator GORTON. With that, I thank you for this report and for your attendance here, and for the moment at least we will excuse you and ask to hear from Nicholas Yost from the Center for Law in the Public Interest.

STATEMENT OF NICHOLAS C. YOST, CENTER FOR LAW IN THE PUBLIC INTEREST

Senator GORTON. Mr. Yost, we have your full statement and it will be included in the record. Because it is relatively long, we would appreciate your hitting the highlights.

Mr. YOST. Certainly, Mr. Chairman, and I certainly will do that. Thank you for inviting me to testify before your oversight hearings on NEPA today.

By way of background, I might note I had served as General Counsel of CEQ from 1977 to 1981 and had the lead responsibility for the development of the regulations which we have been discussing today. Before then I had served as counsel to the State environmental quality study council in California during Governor Reagan's administration there, and have been active in environmental law since the late 1960's.

You asked me to address two basic questions, the first pertaining to the regulations governing the National Environmental Policy Act and the second relating to the need for legislative change. As will be apparent from my presentation, I don't believe the regulations need alteration, nor do I believe the act needs amendment. Both conclusions stem from the same basic fact—that NEPA is working well.

There exists with respect to NEPA and to the regulations which implement it a consensus which I think it fair to state does not exist with respect to any other environmental law in the country. As you are aware, I believe, from your own background as well as from the statements which I have attached to my statement from the U.S. Chamber of Commerce, the Governors' Association, the National Wildlife Federation, and the Natural Resources Defense Council, very diverse groups of interests, all came to feel these regulations were in the public interest and represented a wise implementation of an act with which they all deal.

I might just very briefly summarize that process by which those regulations came into being, because it was a conscious one of trying to build on the work that had been done at CEQ before under its excellent initial chairs, Russell Train and Russell Peterson, as well as to respond to those glitches which had developed over a period of years, particularly the charges of delay, of excess paperwork, and what some felt was an irrelevancy of the process. We set as our goal gaining the support of the environmental community and of the business community, as well as State and local government. We did that by responding to the legitimate concerns which everybody had, discussing with every organization which expressed any reservation. As those on the staff of this committee who have been here for some time will remember, we asked that we be told about any gripes that were brought by anybody to this committee so we could then call on those people, meet with their organizations, find what the problems were and try to respond to those problems, or if we couldn't, explain why we couldn't do so.

Without going into any of the detail of what was involved in that process, the regulations came out with their three general goals of reducing paperwork, reducing delay and seeing that the process really resulted in what Congress intended in the first place, that

Federal decisionmaking, planning, and adoption of policies all be made more sensitive to environmental considerations than had been the case in the past. We think we achieved those goals, and the various organizations which speak for the diverse communities within this country which deal with NEPA apparently agreed. And as I indicated in my statement, I think unlike the case with respect to others within this administration dealing with environmental issues and their relationship with the environmental community, in this case Chairman Hill and his staff have been very attuned to the consensus that had been achieved and sensitive to what I believe to be the wise course of action, which is to try and preserve that consensus rather than polarizing opinion.

As you know, they are in the process of looking at whether some changes might be needed, either in terms of informal guidance or otherwise. But, as Chairman Hill testified earlier on, from what they have heard so far, they see neither the need for amendments to the act nor the need for any sort of major or substantial kind of change in the regulations.

I would hope to be a part of whatever process does continue in the future, but at the same time it seems to me in the one area in the governance of environmental affairs in this country where there is a substantial degree of consensus among the affected interests, it is good public policy to try to preserve that consensus.

With that, I will stop and try to answer any questions you have, Mr. Chairman.

Senator GORTON. Your statement, particularly coming from someone who was involved in the prior administration, is very gracious in its assessment of the current leadership of CEQ with respect to its implementation of NEPA, and, of course, having had the experience which you have you are particularly well situated to help us in connection with improving it still more. You did make one statement that I do want to give you a chance to elucidate on away from the printed statement, and your comment that "there are other areas in which I believe CEQ could exert itself more vigorously." Give me a few of those areas and how you would suggest that CEQ act.

Mr. YOST. In saying that, part of the responsibility is that of CEQ, but part of the responsibility is that of the administration generally. The White House on coming into office, after apparently deciding not to abolish CEQ, greatly reduced its potential by reducing its staff and its budget, going from $3.5 million to less than $1 million a year and going from a permanent staff of 32 people, 16 temporaries, down to a staff of 15, including the members, their secretaries, administrative people, and so on. You cannot do much with that number of people. Chairman Hill decided that he would select two priority areas, and that meant getting out of a lot of other areas. The two priority areas he decided that he would select at the time were the oversight of NEPA and the followup to the "Global 2000" report. I might say that were I to have been in his position with those limitations, I would have chosen the same two areas of emphasis.

However, it is hard being outside an administration to see just what is or is not taking place inside. However, I had taken a leave of absence for half a year from my position as General Counsel of

CEQ to act as director of the Carter administration's followup to the "Global 2000" report, which was a task force of several Cabinet members, and we came out with the so-called "Global Future Report," attempting to list the things that might be done to respond to the problems identified in the "Global 2000."

Very little has been done. Chairman Hill has succeeded in getting appointed an interagency committee to study this administration's response to those problems. However, that committee I believe has only met a couple of times and nothing seems to have emerged from it.

I would think minimally there is no reason the administration can't support legislation such as that introduced by Senator Hatfield to better the predictive capabilities of the United States Government, so whether one is an environmentalist or whether one's concerns are developmental or defense policy, I think we can all agree we want to have the best factual data on which to proceed to have our best educated guesses on what sort of world we are going to be facing from the point of view of resource and environment and population in the year 2000. Senator Hatfield has introduced legislation which I understand that sometime this year will be heard before Senator Roth's committee which seems to me very directly responsive to this. However, the administration has not supported that. So, it is hard to say just where in the decisionmaking process things are or are not happening. But at the end of the pipeline things are not happening in what I consider to be important issues which ought to be faced.

Senator GORTON. Thank you very much. That is a candid point of view, and your testimony on the questions we did ask you is helpful to us. I appreciate your taking time to come and visit with us.

Mr. YOST. Thank you, Mr. Chairman.

Senator GORTON. Our last witness will be Mr. Daniel Cannon of the National Association of Manufacturers.

STATEMENT OF DANIEL W. CANNON, DIRECTOR FOR ENVIRONMENTAL AFFAIRS, NATIONAL ASSOCIATION OF MANUFACTURERS, ACCOMPANIED BY JAN AMUNDSON, DEPUTY GENERAL COUNSEL OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. CANNON. Mr. Chairman, I am Daniel W. Cannon. I have been director of the environmental affairs of the National Association of Manufacturers during the life of NEPA and CEQ. I am accompanied by Jan Amundson, deputy general counsel of NAM. We thank you for the opportunity to submit our views.

As a historical background, I have attached to my testimony a copy of a presentation which I made in 1972. It discusses some of the early cases under NEPA involving the Alaska pipeline and the beginnings of the U.S. nuclear power program.

We have come a long way from those early days of NEPA. The departments and agencies of the Federal Government have become much more sophisticated in the preparation of environmental impact statements and have become expert in making them substantially, but not completely, unchallengeable by litigation.

Today, the biggest administrative challenge is to insure that paperwork and time delays are kept to a minimum while the marshaling of relevant facts and data and subsequent analyses are accelerated to the greatest possible degree consistent with sustainable conclusions.

CEQ plays an indispensable role as a vehicle for channeling feedback from the regulated community to the departments and agencies of the Federal Government, and this makes possible a process of continuing improvement in the implementation of NEPA.

We were very pleased when CEQ published in the Federal Register in August of 1981 a request for public comments on the Federal agencies' implementation of CEQ's NEPA regulations. A number of our member companies responded to this request. And we are also very pleased that CEQ is going to hold a public hearing on August 12, 1982 to examine issues in which guidance from CEQ to the Federal agencies is appropriate.

Among the points made by our member companies in their comments are that decisive issues are not identified early enough in the process; data and analyses available from other Federal agencies are not used; and much paper is devoted to descriptive material rather than to analysis; and there is frequently duplication with State and local procedures; there is a need for more uniformity among the agencies; and there have sometimes been unfortunate and costly delays.

The environmental impact statement process is valuable in that it compels a thoughtful public consideration of environmental factors for relevant major activities. However, there needs to be a strong effort at continual improvement in the process. CEQ plays a key role in the efforts toward this improvement.

Unfortunately, special interests can use the EIS process to foster indecision and to delay projects badly needed. An NAM member has pointed out litigation involving a number of Outer Continental Shelf leasing sales resulted in delays of 1 to 3 years in that program but with nothing of substance changed at the end of the litigation. I have received permission from that member company to submit their comments for the record of these hearings.

Senator GORTON. We will be happy to have them included in the record. (See p. 97.)

Mr. CANNON. Thank you, Mr. Chairman.

When NEPA was first enacted, many people thought it was merely a procedural law governing the internal activities of Federal agencies and that it conferred no substantive rights. However, it seems to have, obviously, conferred a right to institute litigation which can have very damaging economic impacts, as we have pointed out in the attachment to this testimony.

Just within the last 48 hours, I became aware of the decision of the Seventh Circuit U.S. Court of Appeals in *Wade* v. *Goldschmidt,* which held that private citizens do not have a right to intervene in NEPA cases on the side of the Federal department involved in the case. This involved a highway and bridge construction project, and the Secretary of Transportation was the defendant. It was a suit brought by private citizens who were interested in blocking the construction of the bridge and highway. Some other citizens who were interested in seeing that the highway and the bridge were

constructed tried to intervene in the case on the side of the Department of Transportation, and the court denied them the right to intervene. So, this seems that NEPA not only opens the door to litigation in a rather multifarious manner, but also results in a kind of loaded dice situation in some instances. I would like to have permission to submit that decision in the record.

Senator GORTON. We will be happy to have it included in the record. (See p. 106.)

Mr. CANNON. Therefore, we respectfully suggest to the Congress consideration of an amendment to NEPA which would make CEQ the final arbiter of the sufficiency of environmental impact statements rather than the Federal courts. We believe that this would be a very constructive change and would in no way diminish the beneficial aspects of NEPA. The EIS process has become firmly ingrained in agency decisionmaking. If there ever was any need for prolonged litigation, we submit that it no longer exists. The objectives of NEPA can continue to be accomplished to the fullest without resort to the courts.

We thank you very much.

Senator GORTON. I would like to thank you very much, Mr. Cannon. Your statement of support for the current Council on Environmental Quality and the success of NEPA, even with the reservations and proposed changes you make, is, obviously, quite important given the nature of the organization you represent and its broad membership.

I would like to ask whether or not you feel the attitude you represent today is representative of industry and of the general corporate community in the United States?

Mr. CANNON. Yes; we have a policymaking process within the National Association of Manufacturers, and it is a very democratic process that goes through recommendations from task forces to full policy committees to our board of directors. Our Environmental Quality Committee has more than 250 members from all over the country, and indeed our board of directors likewise has more than 200 members that represent all parts of the country and all industries and all sizes of companies. And they have officially formulated a policy statement which expresses the viewpoint that proliferation of—I guess what is popularly referred to as citizen suits—in some ways obstructs the effectuation of, I think, the basic principle on which our democratic Government is founded, that the Federal departments and agencies and the regulatory agencies are supposed to be representative of the people and to carry out the mandates of Congress. And, instead, to set up a process that has judges carrying out those roles is very counterproductive.

We have one case under the Clean Water Act that has gone on for 9½ years now, with EPA reporting back to the judge every 3 months. This is a substitution of the judicial branch of Government for the executive branch.

So, I have every confidence that the viewpoint I have stated is very representative of the broad cross section of American industry.

Senator GORTON. You made the recommendation that judicial review of environmental impact statements be obviated by making the CEQ rather than the courts the final determinant of their ade-

quacy. Have you considered other alternatives which would either lessen the direct or the indirect costs of litigation? At one time or another was there any interest in some kind of bond requirements in connection with losses that resulted from unsuccessful litigation?

Mr. CANNON. Well, no, we haven't gone into the details. In fact, in my testimony I really say that we just suggest to the Congress consideration of an amendment that would make CEQ the final arbiter. We really think that it is a serious problem that should be looked into very carefully by the Congress, and it does carry with it a lot of implications. But we wouldn't at this moment have any detailed recommendations as to how to implement it or what alternatives might be considered.

Senator GORTON. I thank you very much, Mr. Cannon.

With that, the meeting is adjourned.

[Whereupon, at 3:28 p.m., the subcommittee recessed, to reconvene subject to call of the Chair.]

[Statements submitted for the record follow:]

TESTIMONY OF A. ALAN HILL
CHAIRMAN, COUNCIL ON ENVIRONMENTAL QUALITY
BEFORE THE
SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
SUBCOMMITTEE ON TOXIC SUBSTANCES & ENVIRONMENTAL OVERSIGHT
JULY 21, 1982

My name is A. Alan Hill. I am Chairman of the President's Council on Environmental Quality. Because this is the first oversight hearing of the Council's activities held by this subcommittee since I was confirmed as Chairman a year ago, it is a great pleasure to be with you to outline the activities of CEQ.

CEQ'S STATUTORY MISSION

The Council was established by Title II of the National Environmental Policy Act (42 U.S.C. 4321 et seq.). The statutory mission of the Council is spelled out very broadly by the statute. In general terms, the Council is to act as an environmental advisor to the President, monitor and report on trends and conditions with respect to environmental quality, and oversee the manner in which the various federal agencies implement the policies set out in Title I of NEPA.

Additional duties were assigned to the Council by Executive Order 11991 which directed the CEQ to issue regulations to the federal agencies for implementing the procedural requirements of the Act. These regulations were to make the NEPA process a more useful planning process for federal agency decisionmakers, and to guarantee that the

environmental impact statements (EISs) written pursuant to NEPA were concise, analytical documents. The Executive Order also directed the Council to put in place a procedure for mediating environmental disputes between agencies. Regulations pursuant to the Executive Order were promulgated in 1978 and became effective in 1979 (40 C.F.R. 1500 et seq.).

In addition to the duties set out in NEPA and the Executive Order, Congress has given CEQ, in a rather ad hoc manner, a number of other responsibilities. For example, a number of statutes require federal agencies to consult with the Council prior to taking action. Among the statutes imposing other responsibilities on the Council are the Toxic Substances Control Act, the Endangered Species Act, the Marine Mammal Protection Act, and the Clean Air Act.

AGENCY IMPLEMENTATION OF RESPONSIBILITIES

Although the staff and budget of the Council is less in fiscal year 1982 than it had been in past years, the Council has been fully able to carry out its statutory responsibilities.

In carrying out its responsibilities as Presidential advisor, the Chairman of the Council represents the agency at meetings of the Cabinet Council on Natural Resources and fully participates in the deliberations of the Cabinet Council. The Chairman also meets directly with senior White House staff when appropriate to discuss environmental policy issues.

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The Council has also carried out its responsibility to monitor trends and report on the state and condition of the environment in a variety of ways. The Annual Report of the Council contains this year, as it has in the past, a full description and analysis of environmental conditions. Late last year, the Council also published a study entitled Environmental Trends. This study was an update of a similar report produced several years ago. Late last year we also published a report entitled NEPA in Action which was a study of the NEPA offices of 19 different federal agencies. A complete list of the studies published by CEQ over the last year is attached to this statement.

We have several activities now underway which may result in future reports. For example, our staff economist is looking at the issue of the economics of pollution control. This may result in a study to be completed during fiscal year 1983. We are also working on a review of the 1980 Global 2000 Report to the President. We hope to have a substantial amount of the work on this project completed by early 1983. Of course, we will again be producing another annual report.

Finally, we have been devoting a substantial amount of Council staff time to overseeing the manner in which the Federal Government is complying with NEPA and I would like to detail those activities for you. As stated above, the CEQ regulations were designed to reduce delays and paperwork

associated with NEPA and to make the EIS-writing process consistent from agency to agency and from project to project. To do this, the CEQ regulations direct the federal agencies to put in place NEPA procedures consistent with the CEQ regulations. The vast majority of federal agencies now have in place NEPA procedures which have been reviewed by the Council staff. Indeed, a number of agencies, with CEQ encouragement, are now revisiting their NEPA procedures to see if they can be further refined. A complete list of the agencies which have final NEPA procedures and those which are revising their procedures is attached to this statement.

Early in the Reagan Administration, the Vice President's Regulatory Reform Task Force requested the public's help in identifying overly burdensome regulations. During that review process the CEQ regulations were not identified as imposing undue regulatory burdens. In fact letters of support for the regulations were received.

In order to determine whether the regulations were indeed fulfilling their intended purpose -- that is, reducing paperwork and delays -- last summer we asked the public for comments on how the various federal agencies were implementing the CEQ regulations for writing EISs. Specifically, we asked the public for answers to a number of questions about whether and how the agencies were using the various innovations in the regulations designed to make the process more efficient. The specific questions we posed and

a summary of the answers received are attached to this statement for your information.

After reading the comments one can fairly conclude that the CEQ regulations are adding consistency to the NEPA process. There are, however, problem areas which the Council needs to address. We are going to be developing guidance to the federal agencies on how to solve some of the problems identified in the comments. Among the issues which we are going to be examining are:

-- techniques for identifying issues to be analyzed in an EIS;

-- appropriate analysis of alternatives in permitting situations as opposed to situations in which the agency is undertaking activity at its own initiative;

-- agency adoption of analysis done by other federal and state agencies;

-- ways to reduce repetitious analysis in environmental documents;

-- the circumstances in which an agency may charge an applicant for environmental impact preparation.

Guidance in other areas may be developed as determined appropriate by the Council. Although I cannot say at this point that no changes to the CEQ regulations will be made, I want to emphasize that unless new problems are brought to our attention we do not plan to substantially amend the CEQ regulations.

So that CEQ can benefit from the views of both the public and the private sector as we develop this guidance, the Council will be holding a public meeting on August 12, 1982 to hear the views of any interested person. We will be developing guidance documents after that public meeting. I would certainly appreciate any input the members or staff of the Committee may have to offer.

After watching NEPA operate from a close view for the past year, I can make several observations. First, at this point the Administration does not intend to request that the Congress amend the Act. Any substantial revision is simply not warranted at this time. NEPA was enacted to guarantee that environmental considerations were documented and are a part of federal agency decisionmaking. NEPA does not require that an agency make the most environmentally sound decision but rather that environmental considerations be integrated into the decisionmaking process. The agencies have now had over a decade of experience with the statute. I believe that most are now finding the NEPA process a useful planning process.

July 21, 1982

REPORTS ISSUED JUNE 1981 TO JULY 1982

A Summary of the Legal Authorities for Conserving Wild Plants
June 1981
Available through: CEQ

Environmental Trends
July 1981
Available through: GPO

Placing Animals and Plants on the List of Endangered and Threatened Species
July 1981
Available through: NTIS

NEPA In Action - Environmental Offices in Nineteen Federal Agencies
October 1981
Available through: GPO

Improving the Government's Capacity to analyze and predict conditions and trends of Global population, resources, and environment (DRAFT) - Prepared for CEQ by Gerald O. Barney and Associates, Inc.
March 1982
Available through: CEQ

Looking Behind, Looking Ahead
The Private Sector Approach to Global Issues of Population, Resources, and the Environment
May 1982
Available through: CEQ

Environmental Quality 1981
July 1982
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Final Procedures Have Been Published

ADVISORY COUNCIL ON HISTORIC PRESERVATION, 36 CFR Part 805,
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AGENCY FOR INTERNATIONAL DEVELOPMENT, 22 CFR Part 216,
45 70239 (October 23, 1980)
ARMS CONTROL DISARMAMENT AGENCY,
45 FR 84840 (December 23, 1980)
CIVIL AERONAUTICS BOARD, 14 CFR 312,
45 FR 16131 (March 12, 1980)
PROPOSED Amendment: Categorical exclusion
46 FR 56625 (November 18, 1981)
CENTRAL INTELLIGENCY AGENCY,
44 FR 45431 (August 2, 1979)
CONSUMER PRODUCT SAFETY COMMISSION, 16 CFR Part 1021,
45 FR 69433 (October 21, 1980)
DEPARTMENT OF AGRICULTURE, 7 CFR Part 3100,
44 FR 44802 (July 30, 1979),
Amendment, Categorical exclusion,
46 FR 23903 (April 28, 1981)
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45 FR 32312 (May 16, 1980)
Animal and Plant Health Inspection Service,
44 FR 50301 (August 28, 1979)
[Correction: 44 FR 51272 (August 31, 1979)]
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46 FR 56998 (November 19, 1981)
Soil Conservation Service, 7 CFR Part 650,
44 FR 50576 (August 29, 1979)
[Correction: 44 FR 54981 (September 24, 1979)]
Rural Electrification Administration, 7 CFR Part 1701,
45 FR 6592 (January 29, 1980)
DEPARTMENT OF COMMERCE,
45 FR 47898 (July 17, 1980)
Economic Development Administration,
45 FR 63310 (September 24, 1980)
Supplemented: 45 FR 74902 (November 13, 1980)
National Oceanic and Atmospheric Administration
45 FR 49312 (July 24, 1980)
DEPARTMENT OF DEFENSE, 32 CFR Part 214
44 FR 46841 (August 9, 1979)
Army Corps of Engineers, 33 CFR Part 230
45 FR 56760 (August 25, 1980)
[Correction: 46 FR 14745 (March 2, 1981)]
Department of the Army, 32 CFR Parts 650.651
45 FR 69215 (October 20, 1980)
Department of the Navy, 32 CFR Part 775,
46 FR 22892 (April 22, 1981)

DEPARTMENT OF ENERGY
45 FR 20694 (March 28, 1980)
Amendment: Special Procedures
45 FR 78756 (November 26, 1980)
Amendments: Categorical exclusions
47 FR 7976 (February 23, 1982)
46 FR 14377 (February 27, 1981)
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, 24 CFR Part 50,
44 FR 67906 (November 27, 1979)
DEPARTMENT OF THE INTERIOR,
45 FR 27541 (April 23, 1980)
Bureau of Indian Affairs,
46 FR 7490 (January 23, 1981)
Bureau of Mines,
45 FR 85528 (December 29, 1980)
Bureau of Land Management
46 FR 7492 (January 23, 1981)
PROPOSED Amendment: Categorical exclusion
46 FR 60278 (December 9, 1981)
Fish and Wildlife Service
45 FR 47941 (July 17, 1980)
Amendment: Categorical exclusions,
47 FR 28841 (July 1, 1982)
Geological Survey,
46 FR 7485 (January 23, 1981)
Heritage Conservation and Recreation Service,
45 FR 76801 (November 20, 1980)
Lowell Historic Preservation Commission,
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National Park Service,
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Office of Surface Mining, Reclamation and Control,
46 FR 7487 (January 23, 1981)
Bureau of Reclamation,
(formerly Water and Power Resources Services)
45 FR 47944 (July 17, 1980)
PROPOSED Amendment: Categorical exclusion
46 FR 61337 (December 16, 1981)
DEPARTMENT OF HEALTH AND HUMAN SERVICES,
45 FR 76519 (November 19, 1980)
Amendment: Categorical exclusions,
47 FR 2414 (January 15, 1982)
DEPARTMENT OF LABOR, 29 CFR Parts 11, 1999
45 FR 51887 (August 1, 1980)
DEPARTMENT OF JUSTICE, 28 CFR Parts 19,61
46 FR 7953 (January 26, 1981)
Drug Enforcement Agency,
46 FR 7956 (January 26, 1981)
Immigration and Naturalization Service,
46 FR 7956 (January 26, 1981)
Bureau of Prisons,
46 FR 7955 (January 26, 1981)
Office of Justice, Assistance, Research and Statistics
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46 FR 7957 (January 26, 1981)

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45 FR 59553 (September 10, 1980)
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[Correction: 45 FR 85449 (December 29, 1980)]
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ENVIRONMENTAL PROTECTION AGENCY, 40 CFR Part 6,
44 FR 64174 (November 6, 1979)
Amendment: Categorical exclusions,
47 FR 9827 (March 8, 1982)
EXPORT-IMPORT BANK, 12 CFR Part 408,
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45 FR 81733 (December 12, 1980)
FEDERAL EMERGENCY MANAGEMENT AGENCY, 44 CFR Part 10,
45 FR 41141 (June 18, 1980)
Amendments: Categorical exclusions
46 FR 2049 (January 8, 1981)
46 FR 54346 (November 2, 1981)
[Correction: 46 FR 55116 (Nove er 5, 1981)]
FEDERAL MARITIME COMMISSION,
45 FR 33996 (May 21, 1980)
Amendment: Categorical exclusions,
47 FR 3359 (January 25, 1982)
FEDERAL TRADE COMMISSION, 16 CFR Part 1,
47 FR 3095 (January 22, 1982)
GENERAL SERVICES ADMINISTRATION
45 FR 83 (January 2, 1980)
Public Buildings Service,
44 FR 65675 (November 14, 1979)
INTERNATIONAL BOUNDARY AND WATER COMMISSION
46 FR 44083 (September 2, 1981)
INTERNATION COMMUNICATION AGENCY,
44 FR 45489 (August 2, 1979)
INTERSTATE COMMERCE COMMISSION, 49 CFR Part 1108
45 FR 79810 (December 2, 1980)
MARINE MAMMAL COMMISSION, 50 CFR Part 530
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NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,
14 CFR Parts 1204, 1216
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[Corrections: 44 FR 49650 (August 24, 1979)
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NATIONAL CAPITOL PLANNING COMMISSION,
44 FR 64923 (November 8, 1979)
Amendment: Categorical exclusions,
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NATIONAL CREDIT UNION ADMINISTRATION, 12 CFR Chapter VII
45 FR 12211 (February 25, 1980)
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PENNSYLVANIA AVENUE DEVELOPMENT CORPORATION, 36 CFR Part 907,
47 FR 8767 (March 2, 1982)
POSTAL SERVICE, 39 CFR Part 775
44 FR 63524 (November 5, 1979)
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47 FR 19991 (May 10, 1982)
SAINT LAWRENCE SEAWAY DEVELOPMENT CORPORATION,
46 FR 28795 (May 28, 1981)
SMALL BUSINESS ADMINISTRATION,
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44 FR 69921 (December 5, 1979)
[Correction: 45 FR 73034 (November 4, 1980)]

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DEPARTMENT OF AGRICULTURE
Farmers Home Administration, 7 CFR Parts 1901, 1940,
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PROPOSED Amendment: Radiofrequency Radiation,
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[Correction: 47 FR 10871 (March 12, 1982)]
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46 FR 23070 (April 23, 1981)

EXECUTIVE OFFICE OF THE PRESIDENT
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July 12, 1982

On August 14, 1981, the Council on Environmental Quality requested comments from the public on how the various Federal agencies are implementing the regulations promulgated by the Council in 1978. The Council received 142 comments. Sixty-nine commenters represented business groups; fifteen represented environmental groups; thirteen represented Federal agencies; forty represented state and local governments and five represented other interests. The questions asked by the Council and the responses received are summarized below.

1. Is the scoping process a useful procedure for identifying controversial issues?

Most commenters believe that the scoping process is a useful procedure to identify controversial issues. Generally, those who believe otherwise think it is not useful because meetings are poorly attended, the focus is on the proposal itself rather than identifying issues to be analyzed, or the controversial issues have already been identified.

Although supporting the concept of scoping, most commenters have some complaint about how scoping is implemented. Many industry commenters state that scoping is not being used to identify minor, insignificant or irrelevant issues, which could receive less attention or be eliminated from further consideration. They believe that this problem, in part, relates to the responsible agencies' failure to properly manage the scoping process. These commenters see the lead agency allowing the scoping meeting to become an open forum for those wishing to delay or stop the proposal. In addition, they think that the lead agency is abdicating its responsibility to determine which issues are, in fact, significant and which are not. They complain that the agency feels obligated to address and answer all comments to avoid legal challenge to the final document. As a solution, these commenters suggest that the responsible agencies better manage scoping meetings and that agencies establish guidelines for determining what constitutes an insignificant issue.

Another concern many commenters mention is that there is no end to identifying issues. In particular, they criticize cooperating agencies for failing to participate in early scoping, and, instead, raising issues when the draft environmental impact statement is circulated. The commenters offer several ways to finalize boundaries of analysis for the environmental impact statement (EIS) during the initial scoping process and to limit the introduction of new issues into the EIS: an agency which chooses not to participate during the scoping process could be barred from further participation in the development of that particular environmental document; scoping could be terminated at a designated time and the lead agency could provide interested parties a written memorandum setting out the issues. Commenters suggest that, absent compelling circumstances, agencies not respond to issues which could have been raised during the scoping process but were not considered.

Commenters also noted that scoping meetings should be held in the communities potentially affected by the project and that scoping provides a communication framework if more than one federal agency is involved.

2. Is the scoping process used at an appropriate stage in the development of agency proposals?

Almost all the commenters believe that the earlier the EIS process and scoping begins, the more easily it can be integrated into an agency's planning process and the less likely the EIS will be used to justify decisions already reached.

One group which criticizes the timing of the scoping process consists of industry members who must obtain Federal permits for private projects. These industry commenters complain that the scoping process, as required by CEQ regulations, occurs too late for Government agencies and too early for the general public. They believe scoping in relation to Government agencies occurs too late, because decisions concerning project feasibility, engineering, design, development plans, and financing have been made long before scoping officially begins. They submit that the relevant agencies are involved and provide significant input during the planning phase of a privately initiated project. These commenters argue that, therefore, by the time official scoping begins, the controversial or

significant issues are already known. For the scoping process to have value in decisionmaking for them, these industry applicants think that scoping meetings should be held when the applicant is still in the formulating stage of a project. They suggest that procedures be established for a private applicant to elect to have scoping precede the formal permit application.

However, these same industry commenters believe that the scoping process occurs too early for the general public. They submit that at the time scoping as required by CEQ begins, a project is not naarrowly enough or adequately defined to stimulate public interest or to allow the public to provide meaningful input. These commenters state that the public asks specific questions about a project and information to answer such questions is not developed until a later stage of the project.

3. Is tiering being used to minimize repetition in an environmental assessment and in environmental impact statements?

Approximately half of those commenting indicate that tiering environmental documents is an effective concept and suggest that it be used more extensively. Not quite a third of those responding question the value of tiering. The rest of the commenters state they have had no experience in applying the concept of tiering.

Strongly supporting the concept of tiering is the energy industry, a group which comments that tiering is valuable and should be used more extensively by all Federal agencies. The concept of tiering is also supported, but to a lesser extent, by Federal government commenters and by public interest groups and individuals. State and local agencies generally question the utility of tiering.

Commenters in favor of tiering state that it minimizes repetition in environmental documents and cite reduced time delays and cost in fulfilling environmental requirements. These commenters feel that the concept of tiering should be used in all environmental documents and not just environmental impact statements. They suggest that it would be useful to address impacts on a wide scope and would reduce repetition between broad project issues and site specific issues by breaking these down into separate environmental impact statements. Lastly, these commenters believe that tiering should be applied to state and local environmental <u>studies</u> and to fulfill state statutory requirements.

In contrast, other commenters think that tiering is not effective in reducing repetition in environmental documents stating that it only adds an additional layer of paperwork to fulfill environmental requirements. These commenters feel that the second level EIS necessary for tiering is likely to repeat most of the information contained in the original EIS and force a re-analysis of the same issues. Other commenters state that the initial EIS under the tiering concept cannot be effectively prepared when issues are too broad to analyze properly and alternatives are of such broad scope as to preclude meaningful consideration by the public. Commenters express concern that a "tiered" EIS might be judged to be inadequate by the courts. Lastly, a few commenters feel that under the tiering concept, the initial EIS might need to be supplemented prior to circulating the second level statement to reflect any changed conditions, resulting in an additional layer of environmental processing.

A few commenters support the concept of tiering but question its usefulness. These commenters think that changes will be occurring so rapidly in project development phases that the initial statements prepared under the tiering concept will always have to be supplemented and may never be truly valid documents. State and local public works agencies (particularly transportation departments) feel very strongly that tiering is of no value for their projects.

A significant number of commenters indicate that they have no experience with the concept of tiering and therefore could offer no useful suggestions for implementing it.

4. Have categorical exclusions been adequately identified and defined?

The response to this question was varied; however, there was considerable belief that categorical exclusions were not adequately identified and defined. Approximately one-half of the commenters indicate that categorical exclusions are not well identified and defined, approximately one-fourth of the commenters think that they are correctly defined, and the rest have mixed reactions or had no comment. Most comments from Federal agencies and environmental groups think they are adequately identified and defined whereas comments from state and local governments are evenly divided on the

question. Industry showed an overwhelming belief that categorical exclusions were not adequately identified or defined.

Most commenters think that additional categorical exclusions are necessary. Many indicate that existing categorical exclusions and/or their interpretations are too restrictive. They also believe that the current procedures to add categorical exclusions are cumbersome. Many believe that the concept of categorical exclusions cannot be adequately addressed by a list of actions. They believe that a determination that a project can be excluded from NEPA review should be based on the definition of categorical exclusions contained in the CEQ regulations (40 CFR 1508.4) and not on a fixed agency list.

A few of the comments indicate that agencies require too much paperwork to document that the proposal can be categorically excluded. Others indicate that agencies are being overly conservative in interpreting categorical exclusion criteria and are requiring environmental assessments because of the fear of litigation.

Some comments include requests that specific categorical exclusions be added to agency lists, that mechanisms be established to identify quickly a project as a categorical exclusion, and that particular Federal agencies' restrictive interpretations of categorical exclusion criteria be investigated by the Council on Environmental Quality.

5. Are environmental impact statements emphasizing analysis or description?

The majority of commenters believe that EISs emphasize description over analysis. Few commenters feel that analysis is being emphasized. Commenters typically indicate that the EIS is being used as a "compliance" document rather than a decisionmaking tool, that too much unnecessary information is being collected to hedge against potential litigation, and that too much "filler" material is being included.

A number of commenters indicate that, although there currently is an overemphasis on description, EIS's are providing more analysis of issues and impacts than they were prior to the CEQ regulations. These commenters feel future EISs will become more analytical.

Many commenters feel that a combination of analysis and description is the best course of action--description to properly understand the impacts and issues being addressed and analysis to pinpoint the differences among alternatives. The problem, as recognized by many commenters, is in achieving the proper balance between the two.

6. Are environmental documents being integrated with any other analyses required prior to taking action?

The majority of comments received on this question indicate that environmental documents are being effectively integrated with other analyses. These comments did indicate, however, a belief that the EIS should address all environmental requirements. Such requirements include Section 106 of the National Historic Preservation Act of 1966, Section 7 of the Endangered Species Act, Section 404 of the Clean Water Act, the Fish and Wildlife Coordination Act, the Wild and Scenic Rivers Act, and others. These commenters did not feel that excessive information is required to fulfill the requirements of these other statutes and that the degree of coverage of these issues can be thoroughly identified during the scoping process.

A substantial minority of commenters indicate that EISs are not adequately integrated with other analyses. These commenters feel that better coordination is needed between the lead agency and any cooperating agencies involved on the proposed action to properly integrate requirements. A few commenters indicate that EISs which are not integrated often duplicate or merely expand upon information that is currently available from State resources or other agencies.

A few commenters indicate that occasionally environmental documents are being integrated with other analyses, but that it is occurring too late in the process. They note, however, that it is being accomplished with more success than when the EIS process first began.

7. To what extent has duplication with state and local procedures been reduced, especially in states with legal requirements similar to NEPA?

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The commenters are divided in their response to this question although most perceive that there is still unnecessary duplication with state and local procedures. Generally, those who think duplication has been reduced cite the use of a single EIS which combines federal and state requirements. They note that scoping is utilized to integrate state and local procedures with federal requirements. In addition, they indicate that state agencies are often willing to accept compliance with federal reqiurements as satisfying state procedures.

Of those commenters noting that duplication has not been sufficiently reduced, almost all mention that the problem is the refusal of federal agencies to accept compliance with state environmental requirements as satisfying federal reqirements. They complain that they must prepare essentially the same environmental information in two formats to satisfy state and federal procedures. Some commenters suggest that NEPA or the CEQ regulations be revised to allow a federal agency to act based on existing state documents. Others propose that prior to the drafting of the federal agency EIS, an agency should be required to consult with state agencies requiring EISs so that the incorporation of all requirements into one document is facilitated.

Other suggestions include a NEPA exemption for those actions subject to equivalent review by independent state agencies and compliance only for requirements not covered by state law.

8 & 9. Are there suggestions for reducing costs in the preparation of environmental impact statements? Are there suggestions for reducing delays in the preparation of environmental impact statements?

Virtually all commenters indicate that suggestions for reducing costs also reduce delays in preparing EISs. Thus, to avoid duplication, the response to these two questions has been combined. Many of the comments presented here are also mentioned under other questions.

There are six major areas receiving comments, including: 1) better management of the EIS process, 2) content of the EIS, 3) more effective scoping, 4) unnecessary regulatory requirements, 5) statutory suggestions, and 6) other comments.

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A considerable number of comments indicate that federal agencies can significantly reduce time delays and the cost of EISs through better internal and external management practices. The most frequent comment from non-federal commenters is that the federal lead agency should identify a project coordinator to oversee the EIS process. This project coordinator would be assisted by an interagency project management team which would periodically meet to discuss the status of the EIS. The project management team would include state and local agency representatives (and possibly citizen groups) and would ensure timely and effective coordination and preparation of the EIS.

Federal agencies are also criticized by a number of commenters for not establishing and maintaining tight time schedules for preparing the EIS, for not providing responsive and timely review comments (e.g., "need more information" on an impact without identifying the information they really desire), for not maintaining tighter cost management over consultant contracts, and for not accepting the environmental processing of another federal agency. Other commenters request that federal agencies have their legal staff review EISs in an attempt to reduce the chances of subsequent litigation. A few commenters indicate that certain federal agencies need better trained personnel in environmental matters to expedite EIS processing.

The form and content of the EIS also received a considerable number of comments. The most frequent comment is that the EIS should encompass all federal environmental requirements (i.e., endangered species, historic preservation, permits, and others) and be the basis for all federal decisionmaking. These commenters believe that the final EIS should be the last environmental processing on a proposed action, including all necessary permits. Others suggest that permits be granted within 30 days from final EIS approval. These commenters believe that the information needed to address all requirements can be identified during scoping and will not require excessive detail in the document.

Other comments indicate that alternatives should be developed consistent with the federal action under consideration. Impacts of these alternatives will reflect their likelihood of occurrence and the non-significant issues will receive little, if any, attention in the EIS.

The scoping process is viewed by many commenters as an area where significant improvements can be made in reducing costs and time delays in preparing EISs. Most commenters believe that scoping should begin as early as possible and should define and limit the alternatives and issues to be addressed in the EIS. Issues or alternatives identified "late" in the process would only be addressed under extraordinary circumstances. These commenters believe that the scoping process needs to officially "end" at some point so that "late" discovery can be addressed in a lesser manner. Other major scoping actions are to identify and exclude non-significant issues prior to data collection, to identify sources of existing information, and to establish a schedule for preparing the EIS. A few commenters believe that scoping should be optional.

Certain governmental agencies cite specific requirements of the CEQ regulations as being unnecessary or in need of change. Specifically the record of decision requirement (40 CFR 1505.2) was cited as being unnecessary; the referral process (40 CFR 1504) was cited as adding delays to the NEPA process; the requirement for identifying the "environmentally preferable" alternative in the record of decision (40 CFR 1505.2) was cited as too subjective and serving no useful purpose; contractor selection and disclosure (40 CFR 1506.5(c)) was cited as adding unnecessary time and cost in preparing environmental impact statements; and the value of listing the EIS preparers (40 CFR 1502.17) was questioned.

Some commenters believe there is a need to legislatively limit litigation based on an EIS. These commenters suggest that a statute of limitations be placed on EIS lawsuits, that the lawsuits be limited to issues raised prior to the approval of the final EIS, and that the court have the prerogative to impose costs for frivolous lawsuits. The general viewpoint of these commenters is that some EIS lawsuits are filed to halt or, at least delay, a project and are not the result of a desire to balance environmental considerations. Another suggestion, also requiring legislative action, is to allow a Federal agency to comply with its NEPA responsibilities by relying on a state prepared EIS produced under a state statute similar to NEPA. A few commenters did not believe in the NEPA process and suggest that the original statute be repealed.

Other suggestions for reducing time delays and cost are to require the applicant to pay all, or part of, the cost of preparing the EIS and greater use of tiering.

10. To what extent, if any, have agencies required an applicant to submit information in excess of that needed to make a decision on an application?

On this question, the commenters are divided. Reviewing agencies and public interest groups believe that only the minimum necessary information or not enough is required whereas applicants believe too much is required.

Many industry and state commenters criticize agencies for not utilizing relevant data provided it for other projects or information provided to other agencies for the particular project under consideration. One commenter suggested establishing a central computer information system to reduce the duplication of data requested.

Some commenters view the problem as one of timing, with information being requested out of sequence, at the eleventh hour, or over a protracted period of time. They submit that the initial request should set out as completely as possible all data necessary for the agency to make its decision.

In two particular situations commenters indicate that excessive information is required. First, some agencies require an applicant to provide information regarding an action which is categorically excluded. Second, an agency may request information which has been provided for an EIS prepared at an earlier stage in the development of that project.

Some commenters argue that a permitting agency should be required to deal only with the activity for which the permit is applied and should not expand its review beyond that specific activity. These commenters believe that limiting the scope of review would greatly reduce information requests for extraneous or insignificant matters.

Many commenters are concerned that excessive information is being requested due to a fear of lawsuits rather than to help an agency official make a decision.

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11. What day-to-day agency practices could be improved to assure better compliance with NEPA?

The commenters offer a number of suggestions for improving agency practices to assure better NEPA compliance. Many commenters point out that interagency coordination and cooperation should be improved. They see different agencies acting as adversaries, a practice which should be reduced or eliminated. They believe that greater interagency cooperation will result in a truly interdisciplinary decisionmaking process, as well as improving objectivity and consistency within and among agencies.

Some commenters think that stricter agency compliance with CEQ regulations is needed. They believe constant vigilance is necessary to assure that special interest groups do not dominate the EIS process. However, others complain that agency procedues provide little flexibility to account for differences in project scale or scope.

Several commenters focus on agency staff effectiveness. In particular, some voice concern over the effect of budget cuts on staff numbers and the overall effectiveness of the NEPA process. Other commenters state that agency personnel are untrained or improperly trained and suggest that staff receive periodic training to review NEPA, CEQ regulations, and EIS procedures. Also, commenters complain about the lack of continuity when key personnel are changed during the NEPA process.

Some commenters praise the use of third party consultants. However, others state that EIS preparation should be done by agency staff rather than outside consultants. These commenters suggest that if consultants are used, strict budget and time schedules should be adopted.

Commenters also note that economics should be a factor considered and discussed in the EIS, that more decisionmaking authority should be delegated from federal to state officials and from headquarters to field personnel, and that specific agency policies and procedures as well as revisions and updates, should be published in the Federal Register.

The comments received by the Council indicate that the preparation of environmental impact statements has become more efficient with better documents being produced as a consequence. The comments also indicate that in certain areas the agencies need to better manage the NEPA process. Consequently the Council will be developing guidance to the Federal agencies to address a number of these problem areas. Specifically the Council will be issuing guidance on the following issues:

-- proper management of the scoping process.

-- appropriate analysis of alternatives in permitting situations as opposed to situations in which the agency is undertaking activity at its own initiative.

-- agency adoption of analysis done by other Federal and State agencies.

-- proper use of tiering to reduce repetitious analyses in environmental documents.

-- the circumstances in which an agency may charge an applicant for EIS preparation.

Guidance in other areas may be developed as determined appropriate by the Council.

So that the Council may benefit from the views of interested members of the public, the Council will be holding a public meeting on August 12, 1982. At this time the Council will hear the views of any interested person who wishes to comment on the issues set out in the previous paragraph. The Council is requesting that oral presentations be limited to seven minutes and an outline of remarks be given to the CEQ General Counsel's office at least seven days before the meeting.

For further information contact: General Counsel's Office (202) 395-5754.

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
722 JACKSON PLACE, N. W.
WASHINGTON, D. C. 20006

Honorable Max Baucus
United States Senate
Washington, D.C. 20510

August 10, 1982

Dear Senator Baucus:

This is in response to your letter of July 22, 1982, posing additional questions to follow up the recent hearings on the Council's activities overseeing the National Environmental Policy Act. Your questions and my responses are set out below.

1. Q: Have you identified any trends in either the types or numbers of lawsuits filed under the National Environmental Policy Act since the regulations governing environmental impact statements became final?

   A: CEQ's regulations implementing the National Environmental Policy Act have been in effect since July 30, 1979. Agencies were instructed to have implementing procedures in place by March of 1980. Although many of the agencies met this goal, others are still in the process of finalizing their guidelines. Thus, agencies have been implementing the regulations for a period of almost 2 1/2 years, and, in some instances, a lesser period. The regulations have not been in place long enough to be able to identify trends in either the number or types of lawsuits filed since they became effective. We can, however, give you some statistics on lawsuits filed since the regulations went into effect.

   In 1979, there were 139 federal actions challenged in court under NEPA. In 1980, 140 actions were challenged. The five agencies which were sued the most frequently in 1979 were in order of frequency the Department of Transportation, the Department of Housing and Urban Development, the Department of the Interior, the Department of Agriculture, and the Department of Defense. In 1980, the "top five" agencies, in order of frequency, were DOT, DOI, HUD, DOD and EPA. The most frequent cause of action for the past 2 years was the allegation that a federal agency failed to prepare an E.I.S. when one was required. The second most frequent charge was that an EIS was legally inadequate. These issues have been the leading causes of action under NEPA since the Act's passage in 1969.

   Some of the litigation which occurred in 1979 and 1980 involved federal action undertaken before promulgation of CEQ's regulations. As the Council studies the course of NEPA litigation in future years, we hope to be able to discern what effect our regulations are having on judicial review of NEPA.

2. Q: Since you have been Chairman of the Council, have you encountered any resistance or opposition from federal departments or agencies in instituting procedures under the National Environmental Policy Act regulations? How would you characterize any criticisms you have received from the various departments and agencies?

   A: The Council has not encountered opposition or resistance from federal agencies in the process of instituting or overseeing procedures under our regulations since my tenure as Chairman. Certain portions of the regulations were criticized in comments in response to our requests for comments in August 1981. These criticisms are summarized in the synopsis of comments released on July 12, 1982 and attached to my statement to the Subcommittee.

3. Q: Have budget and personnel reductions in many federal departments and agencies had an effect on the amount of time required to prepare and process environmental impact statements?

   A: Although we are aware of concern regarding the impact of budget and staff reductions on EIS preparation, we have not had any reports of the actual effect of these steps. We are, however, in the process of examining methods by which any such effects might be mitigated. For example, we are encouraging agencies to utilize environmental analyses prepared by other agencies, where appropriate. We are also studying and will issue guidance on judicial decisions which permit an agency to assess an applicant for the costs of preparing environmental documents for NEPA compliance under certain circumstances.

4. Q: In the summary of comments you have received on the implementation of National Environmental Policy Act regulations several references are made to the scoping process. How is this process ideally supposed to work, and what kind of information is collected?

   A: "Scoping" is a process by which all interested parties are invited to identify issues which they think should be addressed in a particular environmental impact statement. Scoping is the first step an agency should take after publishing a notice of intent to prepare an environmental impact statement. Scoping may occur through any process, such as meetings or written communication, and all affected federal, state and local agencies and interested members of the public should be invited to participate. Aside from identification of issues, the scoping process also helps to identify requirements of other environmental laws which affect the proposal, and to allocate responsibilities between lead and cooperating agencies.

   CEQ issued guidance on the scoping on April 30, 1981. A copy of that document is attached.

5. Q: You mention in your testimony that CEQ is conducting a review of the Global 2000 Report. Why was review initiated of a report that was released two years ago? What does the
& review entail and who is participating in it?

6. Q: A criticism of the Global 2000 report has been that contributing agencies and departments are operating from different data bases and differing assumptions in analyzing and interpreting that data. Is the Council working toward improving interagency coordination and Global modelling techniques?

A: At my confirmation hearing, I stated that a high priority for CEQ would be the coordination of White House efforts to address the global environmental issues, including some of those raised in the Global 2000 Report to the President and other recent global studies and reports.

Global 2000 is an important first step to address a number of global issues which have a potential impact on U.S. national interests, including national security. It also stresses the need to improve the U.S. national capability to gather data and to forecast future trends.

In order to provide the President with sound policy coordination among the agencies, I have formed an interagency working group on global issues. The Global Issues Work Group provides the Administration, through the Cabinet Council process, with the collective thinking of senior officials able to take policy level responsibility to recommend appropriate government action on global environmental issues of national concern.

The working group has held six meetings thus far and has begun working on the formidable tasks in its charge. As we progress, we will suggest mechanisms to improve the quality of the government's information base; assess and recommend improvements in the ability of the government to forecast future trends; and provide an optimal basis for long-term policy decisions. The Global 2000 Report stated ". . . the analysis shows that the executive agencies of the U.S. Government are not now capable of presenting the President with internally consistent projections of world trends in population, resources and the environment for the next two decades."

As part of the work group's policy responsibilities, I have undertaken to commit Council resources to provide the work group with an analysis of the strengths and weaknesses of the Global 2000 Report. The preliminary study was completed in May, and has been circulated to the work group for review and action.

7. Q: Since you became Chairman of the Council have you observed any abuses or actively reviewed any departments' or agencies' decision to issue "categorical exemptions" from filing environmental impact statements?

A: "Categorical exclusions" are categories of actions which agencies have found, through experience, generally do not have a significant effect on the human environment.

Initially, agency procedures for excluding categories of activity from environmental review tended to focus on a few very obvious categories, such as personnel actions and criminal law enforcement activities. During the past year, several agencies have taken another look at their categorical exclusions. Based upon their experiences to date, certain agencies have amended their categorical exclusions. Agencies are accomplishing this in one of two ways. Most agencies develop a list of very specific activities which experience has shown have no impact on the environment and therefore may be excluded from NEPA's EIS requirements. Another approach is to describe generic categories of activity which will normally fall outside the requirements of §102(2)(C) of NEPA. This approach leaves the determination of whether a proposal falls into that category with the person who is handling the proposal.

CEQ supports this re-examination of categorical exclusions to reduce time spent studying proposals with trivial environmental effects since we believe that the effect of such a re-examination will be to put more effort into those projects which do have significant environmental impacts.

CEQ's General Counsel's office has been reviewing categorical exclusions revision before they are finalized, and, when needed, has met with agency representatives to suggest modifications. Regardless of what activities are categorically excluded by an agency's guidelines, the agency's procedures must provide a mechanism for identifying extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

I have not observed any abuses of this system, nor have I had any brought to my attention.

I hope that the above information is responsive to your request. Please do not hesitate to contact me if you wish any additional information about the Council's activities.

Sincerely,

A. Alan Hill

A. Alan Hill
Chairman

Attachment

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
722 JACKSON PLACE, N. W.
WASHINGTON, D. C. 20006

April 30, 1981

MEMORANDUM FOR GENERAL COUNSELS, NEPA LIAISONS AND PARTICIPANTS IN SCOPING

SUBJECT: Scoping Guidance

As part of its continuing oversight of the implementation of the NEPA regulations, the Council on Environmental Quality has been investigating agency experience with scoping. This is the process by which the scope of the issues and alternatives to be examined in an EIS is determined. In a project led by Barbara Bramble of the General Counsel's staff, the Council asked federal agencies to report their scoping experiences; Council staff held meetings and workshops in all regions of the country to discuss scoping practice; and a contract study was performed for the Council to investigate what techniques work best for various kinds of proposals.

Out of this material has been distilled a series of recommendations for successfully conducting scoping. The attached guidance document consists of advice on what works and what does not, based on the experience of many agencies and other participants in scoping. It contains no new legal requirements beyond those in the NEPA regulations. It is intended to make generally available the results of the Council's research, and to encourage the use of better techniques for ensuring public participation and efficiency in the scoping process.

NICHOLAS C. YOST
General Counsel

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SCOPING GUIDANCE

I. Introduction

A. Background of this document.

In 1978, with the publication of the proposed NEPA regulations (since adopted as formal rules, 40 C.F.R. Parts 1500-1508), the Council on Environmental Quality gave formal recognition to an increasingly used term — scoping. Scoping is an idea that has long been familiar to those involved in NEPA compliance: In order to manage effectively the preparation of an environmental impact statement (EIS), one must determine the scope of the document — that is, what will be covered, and in what detail. Planning of this kind was a normal component of EIS preparation. But the consideration of issues and choice of alternatives to be examined was in too many cases completed outside of public view. The innovative approach to scoping in the regulations is that the process is open to the public and state and local governments, as well as to affected federal agencies. This open process gives rise to important new opportunities for better and more efficient NEPA analyses, and simultaneously places new responsibilities on public and agency participants alike to surface their concerns early. Scoping helps insure that real problems are identified early and properly studied; that issues that are of no concern do not consume time and effort; that the draft statement when first made public is balanced and thorough; and that the delays occasioned by re-doing an inadequate draft are avoided. Scoping does not create problems that did not already exist; it ensures that problems that would have been raised anyway are identified early in the process.

Many members of the public as well as agency staffs engaged in the NEPA process have told the Council that the open scoping requirement is one of the most far-reaching changes engendered by the NEPA regulations. They have predicted that scoping could have a profound positive effect on environmental analyses, on the impact statement process itself, and ultimately on decisionmaking.

Because the concept of open scoping was new, the Council decided to encourage agencies' innovation without unduly restrictive guidance. Thus the regulations relating to scoping are very simple. They state that "there shall be an early and open process for determining the scope of issues to be addressed" which "shall be termed scoping," but they lay down few specific requirements. (Section 1501.7*). They require an open process with public notice; identification of significant and insignificant issues; allocation of EIS preparation assignments; identification of related analysis requirements in order to avoid duplication of work; and the planning of a schedule for EIS preparation that meshes with the agency's decisionmaking

* All citations are to the NEPA regulations, 40 C.F.R. Parts 1500-1508 unless otherwise specified.

schedule. (Section 1501.7(a)). The regulations encourage, but do not require, setting time limits and page limits for the EIS, and holding scoping meetings. (Section 1501.7(b)). Aside from these general outlines, the regulations left the agencies on their own. The Council did not believe, and still does not, that it is necessary or appropriate to dictate the specific manner in which over 100 federal agencies should deal with the public. However, the Council has received several requests for more guidance. In 1980 we decided to investigate the agency and public response to the scoping requirement, to find out what was working and what was not, and to share this with all agencies and the public.

The Council first conducted its own survey, asking federal agencies to report some of their scoping experiences. The Council then contracted with the American Arbitration Association and Clark McGlennon Associates to survey the scoping techniques of major agencies and to study several innovative methods in detail.* Council staff conducted a two-day workshop in Atlanta in June 1980, to discuss with federal agency NEPA staff and several EIS contractors what seems to work best in scoping of different types of proposals, and discussed scoping with federal, state and local officials in meetings in all 10 federal regions.

This document is a distillation of all the work that has been done so far by many people to identify valuable scoping techniques. It is offered as a guide to encourage success and to help avoid pitfalls. Since scoping methods are still evolving, the Council welcomes any comments on this guide, and may add to it or revise it in coming years.

B. What scoping is and what it can do.

Scoping is often the first contact between proponents of a proposal and the public. This fact is the source of the power of scoping and of the trepidation that it sometimes evokes. If a scoping meeting is held, people on both sides of an issue will be in the same room and, if all goes well, will speak to each other. The possibilities that flow from this situation are vast. Therefore, a large portion of this document is devoted to the productive management of meetings and the de-fusing of possible heated disagreements.

Even if a meeting is not held, the scoping process leads EIS preparers to think about the proposal early on, in order to explain it to the public and affected agencies. The participants respond with their own concerns about significant issues and suggestions of alternatives. Thus as the draft EIS is prepared, it will include, from the beginning, a reflection or at least an acknowledgement of the cooperating agencies' and the public's concerns. This reduces the need for changes after the draft is finished, because it

* The results of this examination are reported in "Scoping the Content of EISs: An Evaluation of Agencies' Experiences," which is available from the Council or the Resource Planning Analysis Office of the U.S. Geological Survey, 750 National Center, Reston, Va. 22092.

reduces the chances of overlooking a significant issue or reasonable alternative. It also in many cases increases public confidence in NEPA and thedecisionmaking process, thereby reducing delays, such as from litigation, later on when implementing the decisions. As we will discuss further in this document, the public generally responds positively when its views are taken seriously, even if they cannot be wholly accomodated.

But scoping is not simply another "public relations" meeting requirement. It has specific and fairly limited objectives: (a) to identify the affected public and agency concerns; (b) to facilitate an efficient EIS preparation process, through assembling the cooperating agencies, assigning EIS writing tasks, ascertaining all the related permits and reviews that must be scheduled concurrently, and setting time or page limits; (c) to define the issues and alternatives that will be examined in detail in the EIS while simultaneously devoting less attention and time to issues which cause no concern; and (d) to save time in the overall process by helping to ensure that draft statements adequately address relevant issues, reducing the possibility that new comments will cause a statement to be rewritten or supplemented.

Sometimes the scoping process enables early identification of a few serious problems with a proposal, which can be changed or solved because the proposal is still being developed. In these cases, scoping the EIS can actually lead to the solution of a conflict over the proposed action itself. We have found that this extra benefit of scoping occurs fairly frequently. But it cannot be expected in most cases, and scoping can still be considered successful when conflicts are clarified but not solved. This guide does not presume that resolution of conflicts over proposals is a principal goal of scoping, because it is only possible in limited circumstances. Instead, the Council views the principal goal of scoping to be an adequate and efficiently prepared EIS. Our suggestions and recommendations are aimed at reducing the conflicts among affected interests that impede this limited objective. But we are aware of the possibilities of more general conflict resolution that are inherent in any productive discussions among interested parties. We urge all participants in scoping processes to be alert to this larger context, in which scoping could prove to be the first step in environmental problem-solving.

Scoping can lay a firm foundation for the rest of the decisionmaking process. If the EIS can be relied upon to include all the necessary information for formulating policies and making rational choices, the agency will be better able to make a sound and prompt decision. In addition, if it is clear that all reasonable alternatives are being seriously considered, the public will usually be more satisfied with the choice among them.

II. Advice for Government Agencies Conducting Scoping

A. General context.

Scoping is a process, not an event or a meeting. It continues throughout the planning for an EIS, and may involve a series of meetings, telephone conversations, or written comments from different interested groups. Because it is a process, participants must remain flexible. The scope of an EIS occasionally may need to be modified later if a new issue surfaces,

no matter how thorough the scoping was. But it makes sense to try to set the scope of the statement as early as possible.

Scoping may identify people who already have knowledge about a site or an alternative proposal or a relevant study, and induce them to make it available. This can save a lot of research time and money. But people will not come forward unless they believe their views and materials will receive serious consideration. Thus scoping is a crucial first step toward building public confidence in a fair environmental analysis and ultimately a fair decisionmaking process.

One further point to remember: the lead agency cannot shed its responsibility to assess each significant impact or alternative even if one is found after scoping. But anyone who hangs back and fails to raise something that reasonably could have been raised earlier on will have a hard time prevailing during later stages of the NEPA process or if litigation ensues. Thus a thorough scoping process does provide some protection against subsequent lawsuits.

B. Step-by-step through the process.

1. Start scoping after you have enough information.

Scoping cannot be useful until the agency knows enough about the proposed action to identify most of the affected parties, and to present a coherent proposal and a suggested initial list of environmental issues and alternatives. Until that time there is no way to explain to the public or other agencies what you want them to get involved in. So the first stage is to gather preliminary information from the applicant, or to compose a clear picture of your proposal, if it is being developed by the agency.

2. Prepare an information packet.

In many cases, scoping of the EIS has been preceded by preparation of an environmental assessment (EA) as the basis for the decision to proceed with an EIS. In such cases, the EA will, of course, include the preliminary information that is needed.

If you have not prepared an EA, you should put together a brief information packet consisting of a description of the proposal, an initial list of impacts and alternatives, maps, drawings, and any other material or references that can help the interested public to understand what is being proposed. The proposed work plan of the EIS is not usually sufficient for this purpose. Such documents rarely contain a description of the goals of the proposal to enable readers to develop alternatives.

At this stage, the purpose of the information is to enable participants to make an intelligent contribution to scoping the EIS. Because they will be helping to plan what will be examined during the environmental review, they need to know where you are now in that planning process.

Include in the packet a brief explanation of what scoping is, and what procedure will be used, to give potential participants a context for their involvement. Be sure to point out that you want comments from participants

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on very specific matters. Also reiterate that no decision has yet been made on the contents of the EIS, much less on the proposal itself. Thus, explain that you do not yet have a preferred alternative, but that you may identify the preferred alternative in the draft EIS. (See Section 1502.14(e)). This should reduce the tendency of participants to perceive the proposal as already a definite plan. Encourage them to focus on recommendations for improvements to the various alternatives.

Some of the complaints alleging that scoping can be a waste of time stem from the fact that the participants may not know what the proposal is until they arrive at a meeting. Even the most intelligent among us can rarely make useful, substantive comments on the spur of the moment. Don't expect helpful suggestions to result if participants are put in such a position.

3. Design the scoping process for each project.

There is no established or required procedure for scoping. The process can be carried out by meetings, telephone conversations, written comments, or a combination of all three. It is important to tailor the type, the timing and the location of public and agency comments to the proposal at hand.

For example, a proposal to adopt a land management plan for a National Forest in a sparsely populated region may not lend itself to calling a single meeting in a central location. While people living in the area and elsewhere may be interested, any meeting place will be inconvenient for most of the potential participants. One solution is to distribute the information packet, solicit written comments, list a telephone number with the name of the scoping coordinator, and invite comments to be phoned in. Otherwise, small meetings in several locations may be necessary when face-to-face communication is important.

In another case, a site-specific construction project may be proposed. This would be a better candidate for a central scoping meeting. But you must first find out if anyone would be interested in attending such a meeting. If you simply assume that a meeting is necessary, you may hire a hall and a stenographer, assemble your staff for a meeting, and find that nobody shows up. There are many proposals that just do not generate sufficient public interest to cause people to attend another public meeting. So a wise early step is to contact known local citizens groups and civic leaders.

In addition, you may suggest in your initial scoping notice and information packet that all those who desire a meeting should call to request one. That way you will only hear from those who are seriously interested in attending.

The question of where to hold a meeting is a difficult one in many cases. Except for site specific construction projects, it may be unclear where the interested parties can be found. For example, an EIS on a major energy development program may involve policy issues and alternatives to the program that are of interest to public groups all over the nation, and to agencies headquartered in Washington, D.C., while the physical impacts might be expected to be felt most strongly in a particular region of the country. In such a case, if personal contact is desired, several meetings

would be necessary, especially in the affected region and in Washington, to enable all interests to be heard.

As a general guide, unless a proposal has no site specific impacts, scoping meetings should not be confined to Washington. Agencies should try to elicit the views of people who are closer to the affected regions.

The key is to be flexible. It may not be possible to plan the whole scoping process at the outset, unless you know who all the potential players are. You can start with written comments, move on to an informal meeting, and hold further meetings if desired.

There are several reasons to hold a scoping meeting. First, some of the best effects of scoping stem from the fact that all parties have the opportunity to meet one another and to listen to the concerns of the others. There is no satisfactory substitute for personal contact to achieve this result. If there is any possibility that resolution of underlying conflicts over a proposal may be achieved, this is always enhanced by the development of personal and working relationships among the parties.

Second, even in a conflict situation people usually respond positively when they are treated as partners in the project review process. If they feel confident that their views were actually heard and taken seriously, they will be more likely to be satisfied that the decisionmaking process was fair even if they disagree with the outcome. It is much easier to show people that you are listening to them if you hold a face-to-face meeting where they can see you writing down their points, than if their only contact is through written comments.

If you suspect that a particular proposal could benefit from a meeting with the affected public at any time during its review, the best time to have the meeting is during this early scoping stage. The fact that you are willing to discuss openly a proposal before you have committed substantial resources to it will often enhance the chances for reaching an accord.

If you decide that a public meeting is appropriate, you still must decide what type of meeting, or how many meetings, to hold. We will discuss meetings in detail below in "Conducting a Public Meeting." But as part of designing the scoping process, you must decide between a single meeting and multiple ones for different interest groups, and whether to hold a separate meeting for government agency participants.

The single large public meeting brings together all the interested parties, which has both advantages and disadvantages. If the meeting is efficiently run, you can cover a lot of interests and issues in a short time. And a single meeting does reduce agency travel time and expense. In some cases it may be an advantage to have all interest groups hear each others' concerns, possibly promoting compromise. It is definitely important to have the staffs of the cooperating agencies, as well as the lead agency, hear the public views of what the significant issues are; and it will be difficult and expensive for the cooperating agencies to attend several meetings. But if there are opposing groups of citizens who feel strongly on both sides of an issue, the setting of the large meeting may needlessly create tension and an emotional confrontation between the groups. Moreover, some

people may feel intimidated in such a setting, and won't express themselves at all.

The principal drawback of the large meeting, however, is that it is generally unwieldy. To keep order, discussion is limited, dialogue is difficult, and often all participants are frustrated, agency and public alike. Large meetings can serve to identify the interest groups for future discussion, but often little else is accomplished. Large meetings often become "events" where grandstanding substitutes for substantive comments. Many agencies resort to a formal hearing-type format to maintain control, and this can cause resentments among participants who come to the meeting expecting a responsive discussion.

For these reasons, we recommend that meetings be kept small and informal, and that you hold several, if necessary, to accomodate the different interest groups. The other solution is to break a large gathering into small discussion groups, which is discussed below. Using either method increases the likelihood that participants will level with you and communicate their underlying concerns rather than make an emotional statement just for effect.

Moreover, in our experience, a separate meeting for cooperating agencies is quite productive. Working relationships can be forged for the effective participation of all involved in the preparation of the EIS. Work assignments are made by the lead agency, a schedule may be set for production of parts of the draft EIS, and information gaps can be identified early. But a productive meeting such as this is not possible at the very beginning of the process. It can only result from the same sort of planning and preparation that goes into the public meetings. We discuss below the special problems of cooperating agencies, and their information needs for effective participation in scoping.

4. Issuing the public notice.

The preliminary look at the proposal, in which you develop the information packet discussed above, will enable you to tell what kind of public notice will be most appropriate and effective.

Section 1501.7 of the NEPA regulations requires that a notice of intent to prepare an EIS must be published in the Federal Register prior to initiating scoping.* This means that one of the appropriate means of giving

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* Several agencies have found it useful to conduct scoping for environmental assessments. EAs are prepared where answering the question of whether an EIS is necessary requires identification of significant environmental issues; and consideration of alternatives in an EA can often be useful even where an EIS is not necessary. In both situations scoping can be valuable. Thus the Council has stated that scoping may be used in connection with preparation of an EA, that is, before publishing any notice of intent to prepare an EIS. As in normal scoping, appropriate public notice is required, as well as adequate information on the proposal to make scoping worthwhile. But scoping at this early stage cannot substitute for the normal scoping process unless the earlier public notice stated clearly that this would be the case, and the notice of intent expressly provides that written comments suggesting impacts and alternatives for study will still be considered.

public notice of the upcoming scoping process could be the same Federal Register notice. And because the notice of intent must be published anyway, the scoping notice would be essentially free. But use of the Federal Register is not an absolute requirement, and other means of public notice often are more effective, including local newspapers, radio and TV, posting notices in public places, etc. (See Section 1506.6 of the regulations.)

What is important is that the notice actually reach the affected public. If the proposal is an important new national policy in which national environmental groups can be expected to be interested, these groups can be contacted by form letter with ease. (See the Conservation Directory for a list of national groups.**) Similarly, for proposals that may have major implications for the business community, trade associations can be helpful means of alerting affected groups. The Federal Register notice can be relied upon to notify others that you did not know about. But the Federal Register is of little use for reaching individuals or local groups interested in a site specific proposal. Therefore notices in local papers, letters to local government officials and personal contact with a few known interested individuals would be more appropriate. Land owners abutting any proposed project site should be notified individually.

Remember that issuing press releases to newspapers, and radio and TV stations is not enough, because they may not be used by the media unless the proposal is considered "newsworthy." If the proposal is controversial, you can try alerting reporters or editors to an upcoming scoping meeting for coverage in special weekend sections used by many papers. But placing a notice in the legal notices section of the paper is the only guarantee that it will be published.

5. Conducting a public meeting.

In our study of agency practice in conducting scoping, the most interesting information on what works and doesn't work involves the conduct of meetings. Innovative techniques have been developed, and experience shows that these can be successful.

One of the most important factors turns out to be the training and experience of the moderator. The U.S. Office of Personnel Management and others give training courses on how to run a meeting effectively. Specific techniques are taught to keep the meeting on course and to deal with confrontations. These techniques are sometimes called "meeting facilitation skills."

When holding a meeting, the principle thing to remember about scoping is that it is a process to initiate preparation of an EIS. It is not concerned with the ultimate decision on the proposal. A fruitful scoping process leads to an adequate environmental analysis, including all reasonable

** The Conservation Directory is a publication of the National Wildlife Federation, 1421 16th St., N.W., Washington, D.C. 20036, $4.00.

alternatives and mitigation measures. This limited goal is in the interest of all the participants, and thus offers the possibility of agreement by the parties on this much at least. To run a successful meeting you must keep the focus on this positive purpose.

At the point of scoping therefore, in one sense all the parties involved have a common goal, which is a thorough environmental review. If you emphasize this in the meeting you can stop any grandstanding speeches without a heavy hand, by simply asking the speaker if he or she has any concrete suggestions for the group on issues to be covered in the EIS. By frequently drawing the meeting back to this central purpose of scoping, the opponents of a proposal will see that you have not already made a decision, and they will be forced to deal with the real issues. In addition, when people see that you are genuinely seeking their opinion, some will volunteer useful information about a particular subject or site that they may know better than anyone on your staff.

As we stated above, we found that informal meetings in small groups are the most satisfactory for eliciting useful issues and information. Small groups can be formed in two ways: you can invite different interest groups to different meetings, or you can break a large number into small groups for discussion.

One successful model is used by the Army Corps of Engineers, among others. In cases where a public meeting is desired, it is publicized and scheduled for a location that will be convenient for as many potential participants as possible. The information packet is made available in several ways, by sending it to those known to be interested, giving a telephone number in the public notices for use in requesting one, and providing more at the door of the meeting place as well. As participants enter the door, each is given a number. Participants are asked to register their name, address and/or telephone number for use in future contact during scoping and the rest of the NEPA process.

The first part of the meeting is devoted to a discussion of the proposal in general, covering its purpose, proposed location, design, and any other aspects that can be presented in a lecture format. A question and answer period concerning this information is often held at this time. Then if there are more than 15 or 20 attendees at the meeting, the next step is to break it into small groups for more intensive discussion. At this point, the numbers held by the participants are used to assign them to small groups by sequence, random drawing, or any other method. Each group should be no larger than 12, and 8-10 is better. The groups are informed that their task is to prepare a list of significant environmental issues and reasonable alternatives for analysis in the EIS. These lists will be presented to the main group and combined into a master list, after the discussion groups are finished. The rules for how priorities are to be assigned to the issues identified by each group should be made clear before the large group breaks up.

Some agencies ask each group member to vote for the 5 or 10 most important issues. After tallying the votes of individual members, each group would only report out those issues that received a certain number of votes. In this way only those items of most concern to the members would even make the list compiled by each group. Some agencies go further, and only let

each group report out the top few issues identified. But you must be careful not to ignore issues that may be considered a medium priority by many people. They may still be important, even if not in the top rank. Thus instead of simply voting, the members of the groups should rank the listed issues in order of perceived importance. Points may be assigned to each item on the basis of the rankings by each member, so that the group can compile a list of its issues in priority order. Each group should then be asked to assign cut-off numbers to separate high, medium and low priority items. Each group should then report out to the main meeting all of its issues, but with priorities clearly assigned.

One member of the lead agency or cooperating agency staff should join each group to answer questions and to listen to the participants' expressions of concern. It has been the experience of many of those who have tried this method that it is better not to have the agency person lead the group discussions. There does need to be a leader, who should be chosen by the group members. In this way, the agency staff member will not be perceived as forcing his opinions on the others.

If the agency has a sufficient staff of formally trained "meeting facilitators," they may be able to achieve the same result even where agency staff people lead the discussion groups. But absent such training, the staff should not lead the discussion groups. A good technique is to have the agency person serve as the recording secretary for the group, writing down each impact and alternative that is suggested for study by the participants. This enhances the neutral status of the agency representative, and ensures that he is perceived as listening and reacting to the views of the group. Frequently, the recording of issues is done with a large pad mounted on the wall like a blackboard, which has been well received by agency and public alike, because all can see that the views expressed actually have been heard and understood.

When the issues are listed, each must be clarified or combined with others to eliminate duplication or fuzzy concepts. The agency staff person can actually lead in this effort because of his need to reflect on paper exactly what the issues are. After the group has listed all the environmental impacts and alternatives and any other issues that the members wish to have considered, they are asked to discuss the relative merits and importance of each listed item. The group should be reminded that one of its tasks is to eliminate insignificant issues. Following this, the members assign priorities or vote using one of the methods described above.

The discussion groups are then to return to the large meeting to report on the results of their ranking. At this point further discussion may be useful to seek a concensus on which issues are really insignificant. But the moderator must not appear to be ruthlessly eliminating issues that the participants ranked of high or medium importance. The best that can usually be achieved is to "deemphasize" some of them, by placing them in the low priority category.

6. What to do with the comments.

After you have comments from the cooperating agencies and the interested public, you must evaluate them and make judgments about which issues are in

fact significant and which ones are not. The decision of what the EIS should contain is ultimately made by the lead agency. But you will now know what the interested participants consider to be the principal areas for study and analysis. You should be guided by these concerns, or be prepared to briefly explain why you do not agree. Every issue that is raised as a priority matter during scoping should be addressed in some manner in the EIS, either by in-depth analysis, or at least a short explanation showing that the issue was examined, but not considered significant for one or more reasons.

Some agencies have complained that the time savings claimed for scoping have not been realized because after public groups raise numerous minor matters, they cannot focus the EIS on the significant issues. It is true that it is always easier to add issues than it is to subtract them during scoping. And you should realize that trying to eliminate a particular environmental impact or alternative from study may arouse the suspicions of some people. Cooperating agencies may be even more reluctant to eliminate issues in their areas of special expertise than the public participants. But the way to approach it is to seek concensus on which issues are less important. These issues may then be deemphasized in the EIS by a brief discussion of why they were not examined in depth.

If no concensus can be reached, it is still your responsibility to select the significant issues. The lead agency cannot abdicate its role and simply defer to the public. Thus a group of participants at a scoping meeting should not be able to "vote" an insignificant matter into a big issue. If a certain issue is raised and in your professional judgment you believe it is not significant, explain clearly and briefly in the EIS why it is not significant. There is no need to devote time and pages to it in the EIS if you can show that it is not relevant or important to the proposed action. But you should address in some manner all matters that were raised in the scoping process, either by an extended analysis or a brief explanation showing that you acknowledge the concern.

Several agencies have made a practice of sending out a post-scoping document to make public the decisions that have been made on what issues to cover in the EIS. This is not a requirement, but in certain controversial cases it can be worthwhile. Especially when scoping has been conducted by written comments, and there has been no face-to-face contact, a post-scoping document is the only assurance to the participants that they were heard and understood until the draft EIS comes out. Agencies have acknowledged to us that "letters instead of meetings seem to get disregarded easier." Thus a reasonable quid pro quo for relying on comment letters would be to send out a post-scoping document as feedback to the commentors.

The post-scoping document may be as brief as a list of impacts and alternatives selected for analysis; it may consist of the "scope of work" produced by the lead and cooperating agencies for their own EIS work or for the contractor; or it may be a special document that describes all the issues and explains why they were selected.

7. Allocating work assignments and setting schedules.

Following the public participation in whatever form, and the selection of issues to be covered, the lead agency must allocate the EIS preparation work among the available resources. If there are no cooperating agencies, the lead agency allocates work among its own personnel or contractors. If there are cooperating agencies involved, they may be assigned specific research or writing tasks. The NEPA regulations require that they normally devote their own resources to the issues in which they have special expertise or jurisdiction by law. (Sections 1501.6(b)(3), (5), and 1501.7(a)(4)).

In all cases, the lead agency should set a schedule for completion of the work, designate a project manager and assign the reviewers, and must set a time limit for the entire NEPA analysis if requested to do so by an applicant. (Section 1501.8).

8. A few ideas to try.

a. Route design workshop

As part of a scoping process, a successful innovation by one agency involved route selection for a railroad. The agency invited representatives of the interested groups (identified at a previous public meeting) to try their hand at designing alternative routes for a proposed rail segment. Agency staff explained design constraints and evaluation criteria such as the desire to minimize damage to prime agricultural land and valuable wildlife habitat. The participants were divided into small groups for a few hours of intensive work. After learning of the real constraints on alternative routes, the participants had a better understanding of the agency's and applicant's viewpoints. Two of the participants actually supported alternative routes that affected their own land because the overall impacts of these routes appeared less adverse.

The participants were asked to rank the five alternatives they had devised and the top two were included in the EIS. But the agency did not permit the groups to apply the same evaluation criteria to the routes proposed by the applicant or the agency. Thus public confidence in the process was not as high as it could have been, and probably was reduced when the applicant's proposal was ultimately selected.

The Council recommends that when a hands-on design workshop is used, the assignment of the group be expanded to include evaluation of the reasonableness of all the suggested alternatives.

b. Hotline

Several agencies have successfully used a special telephone number, essentially a hotline, to take public comments before, after, or instead of a public meeting. It helps to designate a named staff member to receive these calls so that some continuity and personal relationships can be developed.

c. Videotape of sites

A videotape of proposed sites is an excellent tool for explaining site differences and limitations during the lecture-format part of a scoping meeting.

d. Videotape meetings

One agency has videotaped whole scoping meetings. Staff found that the participants took their roles more seriously and the taping appeared not to precipitate grandstanding tactics.

e. Review committee

Success has been reported from one agency which sets up review committees, representing all interested groups, to oversee the scoping process. The committees help to design the scoping process. In cooperation with the lead agency, the committee reviews the materials generated by the scoping meeting. Again, however, the final decision on EIS content is the responsibility of the lead agency.

f. Consultant as meeting moderator

In some hotly contested cases, several agencies have used the EIS consultant to actually run the scoping meeting. This is permitted under the NEPA regulations and can be useful to de-fuse a tense atmosphere if the consultant is perceived as a neutral third party. But the responsible agency officials must attend the meetings. There is no substitute for developing a relationship between the agency officials and the affected parties. Moreover, if the responsible officials are not prominently present, the public may interpret that to mean that the consultant is actually making the decisions about the EIS, and not the lead agency.

g. Money saving tips

Remember that money can be saved by using conference calls instead of meetings, tape-recording the meetings instead of hiring a stenographer, and finding out whether people want a meeting before announcing it.

C. Pitfalls.

We list here some of the problems that have been experienced in certain scoping cases, in order to enable others to avoid the same difficulties.

1. Closed meetings.

In response to informal advice from CEQ that holding separate meetings for agencies and the public would be permitted under the regulations and could be more productive, one agency scheduled a scoping meeting for the cooperating agencies some weeks in advance of the public meeting. Apparently, the lead agency felt that the views of the cooperating agencies would be more candidly expressed if the meeting were closed. In any event, several members of the public learned of the meeting and asked to be present. The lead agency acquiesced only after newspaper reporters were able to make a

story out of the closed session. At the meeting, the members of the public were informed that they would not be allowed to speak, nor to record the proceedings. The ill feeling aroused by this chain of events may not be repaired for a long time. Instead, we would suggest the following possibilities:

a. Although separate meetings for agencies and public groups may be more efficient, there is no magic to them. By all means, if someone insists on attending the agency meeting, let him. There is nothing as secret going on there as he may think there is if you refuse him admittance. Better yet, have your meeting of cooperating agencies after the public meeting. That may be the most logical time anyway, since only then can the scope of the EIS be decided upon and assignments made among the agencies. If it is well done, the public meeting will satisfy most people and show them that you are listening to them.

b. Always permit recording. In fact, you should suggest it for public meetings. All parties will feel better if there is a record of the proceeding. There is no need for a stenographer, and tape is inexpensive. It may even be better then a typed transcript, because staff and decision-makers who did not attend the meeting can listen to the exchange and may learn a lot about public perceptions of the proposal.

c. When people are admitted to a meeting, it makes no sense to refuse their requests to speak. However, you can legitimately limit their statements to the subject at hand—scoping. You do not have to permit some participants to waste the others' time if they refuse to focus on the impacts and alternatives for inclusion in the EIS. Having a tape of the proceedings could be useful after the meeting if there is some question that speakers were improperly silenced. But it takes an experienced moderator to handle a situation like this.

d. The scoping stage is the time for building confidence and trust on all sides of a proposal, because this is the only time when there is a common enterprise. The attitudes formed at this stage can carry through the project review process. Certainly it is difficult for things to get better. So foster the good will as long as you can by listening to what is being said during scoping. It is possible that out of that dialogue may appear recommendations for changes and mitigation measures that can turn a controversial fight into an acceptable proposal.

2. Contacting interested groups.

Some problems have arisen in scoping where agencies failed to contact all the affected parties, such as industries or state and local governments. In one case, a panel was assembled to represent various interests in scoping an EIS on a wildlife-related program. The agency had an excellent format for the meeting, but the panel did not represent industries that would be affected by the program or interested state and local governments. As a result, the EIS may fail to reflect the issues of concern to these parties.

Another agency reported to us that it failed to contact parties directly because staff feared that if they missed someone they would be accused of

favoritism. Thus they relied on the issuance of press releases which were not effective. Many people who did not learn about the meetings in time sought additional meeting opportunities, which cost extra money and delayed the process.

In our experience, the attempt to reach people is worth the effort. Even if you miss someone, it will be clear that you tried. You can enlist a few representatives of an interest group to help you identify and contact others. Trade associations, chambers of commerce, local civic groups, and local and national conservation groups can spread the word to members.

3. Tiering.

Many people are not familiar with the way environmental impact statements can be "tiered" under the NEPA regulations, so that issues are examined in detail at the stage that decisions on them are being made. See Section 1508.28 of the regulations. For example, if a proposed program is under review, it is possible that site specific actions are not yet proposed. In such a case, these actions are not addressed in the EIS on the program, but are reserved for a later tier of analysis. If tiering is being used, this concept must be made clear at the outset of any scoping meeting, so that participants do not concentrate on issues that are not going to be addressed at this time. If you can specify when these other issues will be addressed it will be easier to convince people to focus on the matters at hand.

4. Scoping for unusual programs.

One interesting scoping case involved proposed changes in the Endangered Species Program. Among the impacts to be examined were the effects of this conservation program on user activities such as mining, hunting, and timber harvest, instead of the other way around. Because of this reverse twist in the impacts to be analyzed, some participants had difficulty focusing on useful issues. Apparently, if the subject of the EIS is unusual, it will be even harder than normal for scoping participants to grasp what is expected of them.

In the case of the Endangered Species Program EIS, the agency planned an intensive 3 day scoping session, successfully involved the participants, and reached accord on several issues that would be important for the future implementation of the program. But the participants were unable to focus on impacts and program alternatives for the EIS. We suggest that if the intensive session had been broken up into 2 or 3 meetings separated by days or weeks, the participants might have been able to get used to the new way of thinking required, and thereby to participate more productively. Programmatic proposals are often harder to deal with in a scoping context than site specific projects. Thus extra care should be taken in explaining the goals of the proposal and in making the information available well in advance of any meetings.

D. Lead and Cooperating Agencies.

Some problems with scoping revolve around the relationship between lead and cooperating agencies. Some agencies are still uncomfortable with these

roles. The NEPA regulations, and the 40 Questions and Answers about the NEPA Regulations, 46 Fed. Reg. 18026, (March 23, 1981) describe in detail the way agencies are now asked to cooperate on environmental analyses. (See Questions 9, 14, and 30.) We will focus here on the early phase of that cooperation.

It is important for the lead agency to be as specific as possible with the cooperating agencies. Tell them what you want them to contribute during scoping: environmental impacts and alternatives. Some agencies still do not understand the purpose of scoping.

Be sure to contact and involve representatives of the cooperating agencies who are responsible for NEPA-related functions. The lead agency will need to contact staff of the cooperating agencies who can both help to identify issues and alternatives and commit resources to a study, agree to a schedule for EIS preparation, or approve a list of issues as sufficient. In some agencies that will be at the district or state office level (e.g., Corps of Engineers, Bureau of Land Management, and Soil Conservation Service) for all but exceptional cases. In other agencies you must go to regional offices for scoping comments and commitments (e.g., EPA, Fish and Wildlife Service, Water and Power Resources Service). In still others, the field offices do not have NEPA responsibilities or expertise and you will deal directly with headquarters (e.g., Federal Energy Regulatory Commission, Interstate Commerce Commission). In all cases you are looking for the office that can give you the answers you need. So keep trying until you find the organizational level of the cooperating agency that can give you useful information and that has the authority to make commitments.

As stated in 40 Questions and Answers about the NEPA Regulations, the lead agency has the ultimate responsibility for the content of the EIS, but if it leaves out a significant issue or ignores the advice and expertise of the cooperating agency, the EIS may be found later to be inadequate. (46 Fed. Reg. 18030, Question 14b.) At the same time, the cooperating agency will be concerned that the EIS contain material sufficient to satisfy its decisionmaking needs. Thus, both agencies have a stake in producing a document of good quality. The cooperating agencies should be encouraged not only to participate in scoping but also to review the decisions made by the lead agency about what to include in the EIS. Lead agencies should allow any information needed by a cooperating agency to be included, and any issues of concern to the cooperating agency should be covered, but it usually will have to be at the expense of the cooperating agency.

Cooperating agencies have at least as great a need as the general public for advance information on a proposal before any scoping takes place. Agencies have reported to us that information from the lead agency is often too sketchy or comes too late for informed participation. Lead agencies must clearly explain to all cooperating agencies what the proposed action is conceived to be at this time, and what present alternatives and issues the lead agency sees, before expecting other agencies to devote time and money to a scoping session. Informal contacts among the agencies before scoping gets underway are valuable to establish what the cooperating agencies will need for productive scoping to take place.

Some agencies will be called upon to be cooperators more frequently than others, and they may lack the resources to respond to the numerous requests. The NEPA regulations permit agencies without jurisdiction by law (i.e., no approval authority over the proposal) to decline the cooperating agency role. (Section 1501.6(c)). But agencies that do have jurisdiction by law cannot opt out entirely and may have to reduce their cooperating effort devoted to each EIS. (See Section 1501.6(c) and 40 Questions and Answers about the NEPA Regulations, 46 Fed. Reg. 18030, Question 14a.) Thus, cooperators would be greatly aided by a priority list from the lead agency showing which proposals most need their help. This will lead to a more efficient allocation of resources.

Some cooperating agencies are still holding back at the scoping stage in order to retain a critical position for later in the process. They either avoid the scoping sessions or fail to contribute, and then raise objections in comments on the draft EIS. We cannot emphasize enough that the whole point of scoping is to avoid this situation. As we stated in 40 Questions and Answers about the NEPA Regulations, "if the new alternative [or other issue] was not raised by the commentor during scoping, but could have been, commentors may find that they are unpersuasive in their efforts to have their suggested alternative analyzed in detail by the [lead] agency." (46 Fed. Reg. 18035, Question 29b.)

III. Advice for Public Participants

Scoping is a new opportunity for you to enter the earliest phase of the decisionmaking process on proposals that affect you. Through this process you have access to public officials before decisions are made and the right to explain your objections and concerns. But this opportunity carries with it a new responsibility. No longer may individuals hang back until the process is almost complete and then spring forth with a significant issue or alternative that might have been raised earlier. You are now part of the review process. and your role is to inform the responsible agencies of the potential impacts that should be studied, the problems a proposal may cause that you foresee, and the alternatives and mitigating measures that offer promise.

As noted above, and in 40 Questions and Answers, no longer will a comment raised for the first time after the draft EIS is finished be accorded the same serious consideration it would otherwise have merited if the issue had been raised during scoping. Thus you have a responsibility to come forward early with known issues.

In return, you get the chance to meet the responsible officials and to make the case for your alternative before they are committed to a course of action. To a surprising degree this avenue has been found to yield satisfactory results. There's no guarantee, of course, but when the alternative you suggest is really better, it is often hard for a decisionmaker to resist.

There are several problems that commonly arise that public participants should be aware of:

A. Public input is often only negative

The optimal timing of scoping within the NEPA process is difficult to judge. On the one hand, as explained above (Section II.B.1.), if it is attempted too early, the agency cannot explain what it has in mind and informed participation will be impossible. On the other, if it is delayed, the public may find that significant decisions are already made, and their comments may be discounted or will be too late to change the project. Some agencies have found themselves in a tactical cross-fire when public criticism arises before they can even define their proposal sufficiently to see whether they have a worthwhile plan. Understandably, they would be reluctant after such an experience to invite public criticism early in the planning process through open scoping. But it is in your interest to encourage agencies to come out with proposals in the early stage because that enhances the possibility of your comments being used. Thus public participants in scoping should reduce the emotion level wherever possible and use the opportunity to make thoughtful, rational presentations on impacts and alternatives. Polarizing over issues too early hurts all parties. If agencies get positive and useful public responses from the scoping process, they will more frequently come forward with proposals early enough so that they can be materially improved by your suggestions.

B. Issues are too broad

The issues that participants tend to identify during scoping are much too broad to be useful for analytical purposes. For example, "cultural impacts" — what does this mean? What precisely are the impacts that should be examined? When the EIS preparers encounter a comment as vague as this they will have to make their own judgment about what you meant, and you may find that your issues are not covered. Thus, you should refine the broad general topics, and specify which issues need evaluation and analysis.

C. Impacts are not identified

Similarly, people (including agency staff) frequently identify "causes" as issues but fail to identify the principal "effects" that the EIS should evaluate in depth. For example, oil and gas development is a cause of many impacts. Simply listing this generic category is of little help. You must go beyond the obvious causes to the specific effects that are of concern. If you want scoping to be seen as more than just another public meeting, you will need to put in extra work.

IV. Brief Points For Applicants.

Scoping can be an invaluable part of your early project planning. Your main interest is in getting a proposal through the review process. This interest is best advanced by finding out early where the problems with the proposal are, who the affected parties are, and where accomodations can be made. Scoping is an ideal meeting place for all the interest groups if you have not already contacted them. In several cases, we found that the compromises made at this stage allowed a project to move efficiently through the permitting process virtually unopposed.

The NEPA regulations place an affirmative obligation on agencies to "provide for cases where actions are planned by private applicants" so that designated staff are available to consult with the applicants, to advise applicants of information that will be required during review, and to insure that the NEPA process commences at the earliest possible time. (Section 1501.2(d)). This section of the regulations is intended to ensure that environmental factors are considered at an early stage in the applicant's planning process. (See 40 Questions and Answers about the NEPA Regulations, 46 Fed. Reg. 18028, Questions 8 and 9.)

Applicants should take advantage of this requirement in the regulations by approaching the agencies early to consult on alternatives, mitigation requirements, and the agency's information needs. This early contact with the agency can facilitate a prompt initiation of the scoping process in cases where an EIS will be prepared. You will need to furnish sufficient information about your proposal to enable the lead agency to formulate a coherent presentation for cooperating agencies and the public. But don't wait until your choices are all made and the alternatives have been eliminated. (Section 1506.1).

During scoping, be sure to attend any of the public meetings unless the agency is dividing groups by interest affiliation. You will be able to answer any questions about the proposal, and even more important, you will be able to hear the objections raised, and find out what the real concerns of the public are. This is, of course, vital information for future negotiations with the affected parties.

Statement of

NICHOLAS C. YOST

Center for Law in the Public Interest

Environment and Public Works Committee

United States Senate

Washington, D. C.

July 21, 1982

NATIONAL ENVIRONMENTAL POLICY ACT - OVERSIGHT HEARINGS

PRESERVING CONSENSUS

Mr. Chairman and Members of the Committee, I am Nicholas C. Yost and I appreciate your invitation to testify today as part of your oversight of the National Environmental Policy Act.

By way of background, I served in the California Department of Justice for eleven years. During that time, I was Counsel to the State Environmental Quality Study Council, under Governor Reagan and was Deputy Attorney General in charge of the Environmental Unit under Attorney General Evelle Younger during both the Reagan and Brown governorships. During that period, I was deeply involved in the development of California's "little NEPA," that being one of the twenty-six states which has its own environmental impact statement requirement. I then served as General Counsel of the Council on Environmental Quality under President Carter and for the first several months of the Reagan administration. While there, I had lead responsibility for the development of CEQ's NEPA regulations, which are in effect today. After a year as a Visiting Scholar at the Environmental Law Institute,

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I am now engaged in setting up the Washington office of the Center for Law in the Public Interest from California, which has been a national leader in the development of public interest law for more than a decade.

You have asked me to address two basic questions -- the first pertaining to the regulations governing the National Environmental Policy Act and the second relating to the need for legislative change. As will be apparent from my presentation, I do not believe the regulations need alteration, nor do I believe the Act needs amendment. Both conclusions stem from the same basic fact -- that NEPA is working well. There exists with respect to NEPA and its regulations a greater degree of consensus among the interested groups in America -- business, the environmentalists, and State and local government -- than exists with respect to any other environmental law and its implementing regulations. As will be evident from my testimony, groups from the United States Chamber of Commerce to the National Governors' Association to the National Wildlife Federation and the Natural Resources Defense Council have all greeted the present NEPA implementing regulations with warm praise. Quite simply, the existing processes fairly balance the different needs and desires of affected groups. It would be a mistake to disrupt that successful balance.

1. The NEPA Regulations

Let me now turn to the NEPA regulations and discuss how both the way they came to be adopted and the substance of them came to shape the consensus concerning them and concerning NEPA.

a. Background

A little backrgound will be helpful. NEPA, as you will recall, was enacted in 1969 and signed into law on January 1, 1970, by

President Nixon as his first official act of the new decade. Shortly thereafter, at the instigation of the Council on Environmental Quality's first chairman, Russell Train, the President gave CEQ authority to adopt "Guidelines" for agencies to follow in implementing the Act's environmental impact statement requirement. Those permissive Guidelines did much to shape NEPA's successes over the coming years, but were unable, as we shall see, to prevent some of its abuses. These Guidelines governed the implementation of NEPA by all agencies from 1970 until 1979.

Most conspicuous in the early history of NEPA was the litigation under the Act, unanticipated by its authors but crucial to its success. Able lawyers for environmental plaintiffs brought lawsuits challenging the adequacy of impact statements, which gave credibility to the NEPA process. The prospect of an injunction pending compliance with the law does wonders for taking the law seriously and trying to comply with its mandates. This too, however, had its unanticipated consequences. In response to the lawsuits, able lawyers for government and for business applicants responded with advice to put everything in the environmental impact statement so it could not be found inadequate. While sound legal advice, the effect was to encourage the preparations of fat, albeit complete, environmental impact statements which ceased to be usable by the decision makers or members of the public who were their intended readers. Nobody reads 16 volumes. Business meanwhile became extraordinarily concerned over what it perceived as the inordinate time necessary to complete the NEPA process. These two problems of paperwork and delay threatened to give NEPA a bad name.

However, NEPA was simultaneously achieving much of its intended purpose. Federal decision making was improved by the law. Environmental considerations were taken into account where often before they had been

ignored. A good law, many said, but its implementation had picked up altogether too many barnacles. In 1976, the Council published an analysis of six years' experience under NEPA on the part of seventy Federal agencies, which helped lay the groundwork for subsequent reform.

Shortly after the advent of the Carter administration, CEQ, under newly appointed Chairman, Charles Warren, moved promptly to persuade the new President to broaden the former grant of authority. Speaking of NEPA in his first Environmental Message, President Carter said:

> In the seven years since its passage, it has had a dramatic -- and beneficial -- influence on the way new projects are planned. But to be more useful to decision makers and the public, environmental impact statements must be concise, readable, and based upon competent professional analysis. They must reflect a concern with quality, not quantity. We do not want impact statements that are measured by the inch or weighed by the pound.

With that, the President gave the Council a directive in the form of a new Executive Order, 11991, drafted at CEQ, which remains in effect. "Reform the Act," he said, specifying three goals he wished pursued: (1) reduce paperwork; (2) reduce delay; (3) see that the process results in better, more environmentally sensitive decision making.

Those three goals have been accomplished. The new regulations have been welcomed by all segments of American society that deal with them. Those of us at the Council started, at Chairman Warren's direction, with the goal of earning the praise of both the business and environmental communities. We sought to have as open a process as possible, which it was my privilege to direct. We stressed the areas for reform where broad consensus existed, and tried to meet and deal with the concerns of any person or group that had problems with the way NEPA was then being implemented.

b. Adoption of the Regulations

We began in June 1977, with several days of public hearings -- actively involving NEPA's critics as well as its friends -- asking the U.S. Chamber of Commerce to coordinate the presentation of the views of American business; the Building and Construction Trades Department of the AFL-CIO to do so for labor; and the Natural Resources Defense Council for environmental groups. State and local governments, the scientific community and the public generally were all represented.

After the hearings, we developed a 38-page questionnaire which reflected not CEQ's views, but the views of all who testified -- their identification of what the problems were and their suggestions for solving them. We distributed the questionnaire as widely as possible, to all who testified or wrote CEQ, to all State Governors, to those on various mailing lists, and to all who responded to an invitation CEQ placed in the Federal Register. We received hundreds of responses, which we tabulated not only for good ideas, but to see where consensus existed among those who deal with the NEPA process. If both business and environmentalists agreed that something was a good idea, the chances were that it was worth pursuing.

We then met with all major concerned groups and with every agency of the Federal Government. Using the hearing testimony, the questionnaire responses, the collective and extensive NEPA experience of those at CEQ, and the insights provided in our discussions, we prepared our first internal drafts, which were intensively debated, line by line, within CEQ. We then placed a draft into interagency review. This process is designed to give each agency a chance to influence a proposal before the public sees it and if extremely dissatisfied, to try to kill it. While we knew our proposals

would be well received by the business and environmental communities and by State and local governments, we also foresaw that there would be no such easy acceptance within the Federal bureaucracy, staffed by those whose conduct the regulations were designed to change. Our fears were realized. Interagency review took six months, a period crammed with meetings, letters, threats, maneuvers, but one which ended, despite the doubts of some, with success. The proposed regulations were then published in June 1978 for public review, a process which took another half a year. Throughout, we arranged meetings with all who showed concern. For instance, we asked the staffs of Congressional committees with overesight over the NEPA to let us know if they received any complaints. We then sought out those people, listened, and attempted to accommodate any legitimate concerns. When an industry spokesman made a critical comment in the trade press, we contacted him to meet and work on the problems he identified. When a State Governor was critical of the new proposals, I went to meet with him and to spend the day with his staff ironing out the problems. We actively sought to participate in the meetings and conventions of interested groups, both to tell the members what we were doing and to listen to their suggestions. During the process of developing these regulations, Council representatives met with literally every group that expressed dissatisfaction with either NEPA or the regulations. At the end of the process, either the regulations responded to each problem or we explained to the person identifying the problem why not. Every person and every group was listened to, heard and understood, and knew it.

c. Reaction to the Regulations

The process was laborious, but worth it. When, in 1978, the regulations were issued, every major group in the U.S. concerned with the

implementation of NEPA told the Council they supported the new regulations. The United States Chamber of Commerce "congratulated" the Council, finding the regulations "a significant improvement over prior EIS Guidelines." The National Governors' Association "commended" the Council for "a job well done." The Natural Resources Defense Council wrote to "welcome" the regulations as an "important improvement" over the Guidelines, while the National Wildlife Federation complimented the regulations, saying they "cut the wheat from the chaff" and will make the process "much better" for citizens and "for better decisions as well." The Co-Director of the Congression Commission on Federal Paperwork's report on the environmental impact statement concluded that the NEPA regulations were "more than responsive" to all fourteen recommendations which the commission adopted. "They foster real opportunities," he said, "to improve decision making and intergovernmental cooperation, to reduce paperwork and delays, and to save considerable money." (Copies of the letters from these organizations have been attached to and made a part of my statement.)

In 1981, a new administration came into office, not conspicuous for its environmental proclivities and resolved to cut governmental regulation. How did the CEQ NEPA regulations fare? Very well. In the words of newly appointed CEQ Chairman, A. Alan Hill, whom you have heard testify this afternoon, in his confirmation hearings before the committee:*

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*U.S. Congress, Senate, Nominations of A. Alan Hill and W. Ernst Minor, Hearing before the Committee on Environment and Public Works, 97th Congress, 1st Session, June 23, 1981, Ser. No. 97-H23.

> Last March, Vice President Bush called for public comments on all Federal regulations. No criticisms at all were received on CEQ's regulations. One important group, the National League of Cities, even went out of its way and formally endorsed our regulations. The Council has not received any formal requests from anyone -- business, labor, other Federal agencies, state or local agencies -- to make any changes in the current regulations. I should also mention that in June 1979, the U.S. Supreme Court relied on CEQ's regulations in a unanimous decision involving agency requests for appropriations. The Supreme Court broadly endorsed the regulations and the open process followed by CEQ in drafting them. Thus, the regulations have added uniformity and certainty to the process of Federal compliance with environmental laws. Hearings, p. 22.**

In his summary statement, Chairman Hill testified:

> With regard to our Council priorities, I noted our first priority is enforcement of the National Environmental Policy Act. The White House backs us in that. I am very pleased with regard to reports we are receiving from the Vice President's regulatory reform task force which indicates that they are receiving comments highly complimentary of the new regulations which were adopted in 1979. They have improved the process considerably and we want to maintain that interest in a speedy, thoughtful, and least costly process so that environmental values are considered in the decisionmaking process. Hearings, p. 3.

Chairman-designate Hill went on to single out certain major provisions of the regulations for "their success in reducing paperwork and delay." He continued:

> Without going into more detail about the regulations, I will just say that they were written to make the process as flexible as possible, with as little paperwork and delay as possible. Hearings, p. 24.

**The decision of the United States Supreme Court to which Chairman Hill referred was Andrus v. Sierra Club, 442 U.S. 347 (1979). The Court, after characterizing the new provisions as a "single set of uniform, mandatory regulations" (Id., at 357), noted that they were adopted in a "detailed and comprehensive process, ordered by the President, of transforming advisory guidelines into mandatory regulations applicable to all Federal agencies." (Id., at 358.) "CEQ's interpretation of NEPA," said the Court, "is entitled to substantial deference." (Ibid.)

More recent evaluations of the efficacy of the regulations have coincided with the previous ones. Speaking earlier this year, William Futrell, President of the Environmental Law Institute, reviewed the various studies and concluded:

> These investigations performed by diverse groups came to the common conclusion that the NEPA process was working well. Four independent projects conducted by Indiana University, ELI, Columbia University, and the U.S. General Accounting Office concluded that the new NEPA regulations effective in 1979 resulted in better analysis and better decision making.

There is, I believe, a lesson to be learned from the process by which the NEPA regulations were adopted. The success of CEQ's NEPA reforms has been, I suggest, a function of the spirit in which they were undertaken as well as the substance of the changes. Those at CEQ realized that business, environmentalists, labor, State and local governments all had a stake in NEPA's implementation and tried to reach accommodations rather than view any group as adversaries. Above all, those involved listened, hearing what diverse groups' problems were and resolving to do something about each of them.

Quite simply, the NEPA regulations have been warmly greeted by everybody because everybody contributed to them, everybody was listened to and heard, and because the resulting regulations in fact serve everybody well. In brief, the public interest - that of the "public" in all its diversity - was served.

d. Provisions of the Regulations

What are the changes that achieved such consensus? Let me describe the most significant of them after making one general statement -- the regulations were designed to remove the glitches - the barnacles -- that

had come to encumber the NEPA process. They built upon the basic NEPA process that had developed over the years, which was a sound process, but attempted to remove the impediments to its smooth operation. Let me now take the major changes brought about by CEQ's NEPA regulations one by one.

Shorter Documents. The regulations reduce the length of most environmental impact statements to not exceeding 150 pages; in the case of complex proposals, the limit is 300 pages. It was CEQ's intention that statements would be useful to and used by decision makers.

"Scoping." This term, borrowed from the implementation procedures of Massachusetts' "little NEPA," refers to a process that thoughtful project managers use anyway.

"To scope" in this connection means to identify all the agencies that will ultimately be involved in the environmental review process, to involve them early, and to get their views on what the important issues are.

They are also given opportunity to indicate which issues they believe are not important and to recommend dropping these from further consideration. The truly significant problems can then be identified and given adequate study, while those of less importance need not be analyzed at length.

Interagency Cooperation. The regulations emphasize interagency cooperation before the EIS is drafted, rather than adversary comments on a completed document, which prolong the process unnecessarily. Agencies with jurisdiction or expertise, other than the lead agency, no longer sit back and criticize someone else's EIS. Those with permit power or with special knowledge of the circumstances are called "cooperating agencies."

Interdisciplinary Preparation. The regulations place new emphasis on the statutory command to "utilize a systematic, interdisciplinary approach" to decision making. Too many of America's environmental problems have resulted when one profession monopolized the planning and review of a new project. NEPA requires "the integrated use of the natural and social sciences and the environmental-design arts in planning and in decision making."

Alternatives. The regulations now require EISs to emphasize certain options among the range of alternatives, instead of accumulating extensive background material of no use to the decision makers or to the public. The alternatives section of the EIS is described in the regulations as "the heart of the environmental impact statement." Conversely, the section describing the affected environment, traditionally the place for verbosity, is minimized.

Streamlining the Process. Several provisions were aimed at making the whole NEPA process work more smoothly and with less delay:

(1) Time Limits - In the single provision most warmly greeted by the business community, the regulations provide that, at the request of an applicant for a project, the responsible agency must set time limits on the NEPA process, which gives the applicant a degree of certainty it did not have before and a prod to keep laggard agencies moving.

(2) Making the Permit Process Move Smoothly - A series of other measures are also designed to enable private applicants to move their projects through the system rapidly to whatever conclusions the facts warrant:

- The lead agency must identify permits and reviews other than its own that will be necessary before a project is to proceed.
- Requiring other agencies to cooperate in preparing an EIS instead of commenting on a document completed by the lead agency will force the Federal government to get its own act together early and environmental experts to give early consideration to possible impacts of the project.
- Each agency must develop guidelines to aid the many private applicants who simply do not know their way around Federal bureaucratic procedures.
- The regulations use NEPA and its EIS requirement to rope together the pertinent reviews called for by other laws so that they all take place at the same time, with the EIS as the unifying document. The importance of this requirement cannot be missed. It is this requirement which enables an applicant to use the NEPA process as a tool to make all the other Federal requirements move along on the same schedule.
- The other permitting agencies are required to identify information they will need and mitigation measures necessary in order for them to pass on a project, so that all the material will be developed concurrently rather than consecutively.

- Federal agencies must work with state and local governments that have EIS requirements to eliminate duplication through joint planning, joint public hearings and the preparation of a joint environmental impact statement. The NEPA regulations also prescribe a process of "adoption" whereby one federal agency may, with certain safeguards, adopt the studies prepared by another, in order to avoid duplication.

Better Decisions. Congress' purpose in enacting NEPA was to make sure that all federal agencies built environmental considerations into their decision making. This purpose has often been forgotten in implementing the act and attention has focused on the EIS itself more than on the underlying question of whether the project is environmentally sound and should go forward. The new regulations are designed to turn the emphasis back to the basic point: Is the decision sensitive to environmental considerations?

The principal device CEQ chose to redirect emphasis is the "record of decision" which requires the decision maker to briefly record the environmentally preferable alternative (or alternatives) and then to describe how he/she balanced it with other "essential considerations of national policy" in coming to a decision. The regulations do not mandate choice of the environmentally preferable alternative in every case. On the contrary, they explicitly refer to other essential considerations, such as economics or congressionally determined agency mission.

What the regulations do require is that the decision maker pay attention to the bottom line of the EIS: Why not proceed in what the EIS

has shown to be an environmentally sensitive manner, rather than taking a less sensitive or environmentally damaging course? CEQ's intent was to encourage decisions less apt to result in environmental disruption. The decision is still that of the decision-maker subject, of course, to judicial review for compliance with NEPA when an environmentally sound alternative is not adopted.

Follow-Up. Sometimes, in the past, NEPA's role in a project ended with the EIS or with the decision to approve or disallow the project. CEQ decided to make sure the findings of the EIS are reflected in the decision and that decisions about environmentally protective measures are in fact implemented.

2. What Next? Preserve the Consensus

What should be done now? The law itself, the National Environmental Policy Act, is working well. The regulations are working well. The national consensus concerning them is unique. Nowhere else in the field of environmental governance do you find a regulatory system which has merited and elicited the praise of the environmental community, the business community, and State and local government. That consensus should be preserved, not destroyed. The careful balance of interests that went into the NEPA regulations should not be undercut. The law itself should not be changed.

In this respect, I should say something about the leadership of CEQ on this subject. While I would be hard pressed to find much good to say about this Administration's environmental record generally and while there are other areas in which I believe CEQ could exert itself more vigorously, with respect to NEPA and the implementing regulations, the leadership of CEQ has acted in a thoroughly responsible and admirable manner. Chairman Hill, most ably assisted by his General Counsel, Nancy Nord, has so

far acted to preserve the consensus that exists with respect to NEPA and the implementing regulations.

What is needed now is enforcement of those regulations, and, since the regulations are directed in large part at Federal government decision making, what is called for is vigorous oversight of agency performance to see that in fact the regulations are being implemented, in the words of the U.S. Chamber of Commerce, "in the spirit - as well as the letter - intended by the Council." That is what is needed now: listening to the views of all the public and relentlessly overseeing the activities of the various Federal agencies to see that in fact the process is being used to cut down on delay; to see that excess paperwork is gotten rid of; and to see that in fact the NEPA process is being used as intended to build environmental sensitivity into all the planning, policy formulation, and decision making of the Federal Government.

Thank you again for inviting me to be with you today.

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CEQ, Scoping Guidance (April 30, 1981, availale through CEQ).

New Rules for the NEPA Process: CEQ Establishes Uniform Procedures to Improve Implementation, 9 Environmental Law Reporter, January 1979.

Yost, The Environmental Impact Statement Process, Bureau of National Affairs, Corporate Practice Series (1982).

...ESSEN... IN A CHANGING WORLD

Chamber of Commerce of the United States

1615 H STREET, N.W.
WASHINGTON, D.C. 20062

RESOURCES AND ENVIRONMENTAL QUALITY DIVISION
JOHN K. ROBINSON, MANAGER

202 659-6172

January 8, 1979

Mr. Nicholas Yost, Esquire
General Counsel
Council on Environmental Quality
722 Jackson Place, N.W.
Washington, D.C. 20006

Dear Nick:

On behalf of the National Chamber and its 80,000 members, I want to congratulate you and the members of the Council on the excellent work done on the preparation of the November 29, 1978 final EIS regulations.

These regulations are a significant improvement on prior EIS guidelines. (Significant being defined not unlike the definition contained in the new regulations in Section 1508.27).

Industry is eagerly anticipating the implementation process and is extremely hopeful that the process will be carried out in the spirit - as well as the letter - intended by the Council. I know that you and your fine staff will help us ensure that this happens.

Best wishes. We appreciate and value the open and trusting working relationship we have developed in the formulation of this important measure. We hope it will continue in the years ahead.

Sincerely,

Gary D. Knight
Director, Environment and Land Policy

Natural Resources Defense Council, Inc.

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Executive Director

January 24, 1979

Nicholas C. Yost, Esq.
General Counsel
Council on Environmental Quality
722 Jackson Place, N.W.
Washington, DC 20006

Dear Nick:

We at NRDC have long considered the National Environmental Policy Act as the most basic implement which the law provides to foster environmentally responsible decisions by public agencies. No small percentage of our limited resources have been expended in invoking and defending this legislation.

Yet NEPA, as implemented by most agencies, has often been an inefficient and inadequate palliative. Environmental analysis rather than environmental protection has often been pursued as an end in itself.

We therefore welcome the newly promulgated CEQ regulations. They are designed to produce not only better analysis but better decisions, while minimizing the time and effort which past practices have exacted of both federal agencies and public participants.

Without minimizing the problems which we expect to encounter in the agencies' implementation of these regulations, we are confident that they represent an important improvement over the pre-existing guidelines.

We commend the CEQ for putting NEPA on a more productive course.

Sincerely,

John Adams

John H. Adams

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Office of the Governor

Atlanta, Georgia 30334

George Busbee
GOVERNOR

January 4, 1979

Norman Underwood
EXECUTIVE SECRETARY

Mr. Charles Warren, Chairman
Executive Office of the President
Council on Environmental Quality
722 Jackson Place, N.W.
Washington, D.C. 20006

Dear Charles:

On behalf of the National Governors' Association, I want to extend my appreciation for your assistance in helping us resolve problems with the revised implementation procedures for the National Environmental Policy Act. You and your staff afforded us every effort to address the majority of our concerns...

The Council should be commended for reacting promptly to our concerns and for the substantive changes affected. I can assure you that the states are committed to working with you and the federal agencies to ensure that the regulations work.

If implementation of the regulations surfaces difficulties that we had not visualized during the recent negotiations, it is my hope that we would again be able to work with you to affect any needed changes.

Again, my personal thanks for a job well done.

Sincerely,

George Busbee

GB:ghr

bcc: Dave Johnson NGA
Leonard Ledbetter
Joe Tanner
Nicholas Yost CEQ

National Wildlife Federation

1412 16TH ST., N.W., WASHINGTON, D.C. 20036 Phone 202—797-6800

January 17, 1979

The Honorable Charles T. Warren
Chairman
Council on Environmental Quality
722 Jackson Place, N.W.
Washington, D.C. 20006

Dear Mr. Chairman:

The National Wildlife Federation, the nation's largest citizens conservation organization, would like to compliment you and your staff on the development of reasonable regulations for the National Environmental Policy Act which should go a long way toward reducing paper work and promoting more understandable public decisions from public officials.

We know from long experience with NEPA that this was not an easy job. Faced with NEPA's requirements for full disclosure to the public and to decisionmakers of the impacts of a project and its alternatives, agencies too often hide these vital factors in unwieldy impact statements. Your regulations cut the wheat from the chaff. They put the alternatives up front for all to see. And they key the discussion to the essential impacts.

The Federation represents affiliate organizations in every state in the country, several thousand sportsmen's and conservation clubs, and over two million people in all walks of life. Many of them are involved in trying to understand the impacts of federal projects, both positive and negative. Many seek to comment on them, both pro and con. Your new regulations will make this process work better for them and thereby, we think, for better decisions as well.

Sincerely,

Thomas L. Kimball

THOMAS L. KIMBALL
Executive Vice President

GERALD R. MYLROIE

January 26, 1979

The Honorable Charles Warren
Chairman
Council on Environmental Quality
722 Jackson Place, N.W.
Washington, D. C. 20006

Dear Mr. Warren:

As the former Co-Director of the Congressional Commission on Federal Paperwork's report on the environmental impact statement process, I want to congratulate you and your General Counsel, Nick Yost, for your outstanding work in preparing the National Environmental Policy Act regulations.

I was very pleased when President Carter implemented our first recommendation, by his message on the Environment (May 23, 1977) and by his issuing Executive Order 11991 (May 24, 1977) which directed the Council on Environmental Quality to prepare and publish NEPA regulations and to require consistent NEPA procedures by Federal agencies. Now, I am equally pleased to see your final NEPA regulations. The regulations are more than responsive to all our fourteen recommendations which the Commission adopted. They foster real opportunities to improve decisionmaking and intergovernmental cooperation, to reduce paperwork and delays, and to save considerable money.

I look forward to seeing the Federal agencies implement the regulations and apply some creative program and project planning and administration to actually achieve the stated purposes.

As in the past, if I may assist you in this or any other matter, please call me.

Sincerely,

Gerry Mylroie

cc: Nick Yost
Honorable Frank Horton
Richard A. Frank
Robert W. Knecht

Gerald R. Mylroie
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Alan Beals

May 14, 1981

Mr. Malcolm Baldwin
Chairman
Council on Environmental Quality
722 Jackson Place, N.W.
Washington, D.C. 20006

Dear Mr. Baldwin:

Enclosed for your information and use is the National League of Cities response to the Vice President's request for specific recommendations on regulatory reform.

These recommendations have been consolidated with our earlier recommendations to the Task Force on March 20 and have been prepared with the assistance of the International City Management Association. In addition, we have attempted to offer specific recommendations on the regulations which the Task Force selected for review on March 25 (the 27 existing regulations designated for review and 36 "midnight" regulations designated for postponement).

In keeping with the Vice President's request for ten priority issues for action, we have suggested the following areas for immediate review: all regulations governing non-discrimination on the basis of handicapped status; Davis-Bacon requirements; the application of the Fair Labor Standards Act to certain municipal employees; Section 13(c) labor protection requirements for transit employees; auditing procedures and practices; industrial pretreatment standards; waiver of emission standards for motor vehicles; the urban impact analysis requirement; and the expected to reside requirements of the Community Development Block Grant program.

We look forward to continued cooperation with the Task Force and all the federal agencies on this important effort.

Sincerely,

Alan Beals

Alan Beals
Executive Director

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16

Subject: Environmental review process and environmental impact statements

Source: Council on Environmental Quality

Status: Final

Location: 40 CFR 1500-1508 (Vol. 43 of Federal Register, p. 55990 - November 29, 1978)

Description: The Council on Environmental Quality (CEQ) has developed regulations intended to ensure the streamlined implementation of the requirements of the National Environmental Policy Act (NEPA). Because these regulations are not fully implemented, their benefits have yet to be realized. In addition, the environmental impact statement (EIS) requirements are not sufficiently integrated with the environment review requirements of federal agencies.

Recommendations: CEQ's streamlining regulations for the implementation of NEPA requirements should receive full support from the Administration and the federal agencies. In particular, the "scoping" sessions (40 CFR 1501.7), which are designed to bring together key federal, state, and local agencies at the beginning of a project, should be fully utilized to enable local governments and federal agencies to focus on key issues and reach agreement at the early stages of project development.

More use of "tiered" EIS's should be encouraged (40 CFR 1508.28). Under tiering, EIS's can be specific and narrowly focused when the overriding broader EIS is incorporated by reference.

National Association of Manufacturers

TESTIMONY

ON BEHALF OF

NATIONAL ASSOCIATION OF MANUFACTURERS

"COUNCIL ON ENVIRONMENTAL QUALITY

AND NATIONAL ENVIRONMENTAL POLICY ACT"

BEFORE THE

SUBCOMMITTEE ON TOXIC SUBSTANCES AND ENVIRONMENTAL OVERSIGHT

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

UNITED STATES SENATE

JULY 21, 1982

1776 F Street, N.W. • Washington, D.C. 20006 • (202) 626-3700

TESTIMONY
ON BEHALF OF
NATIONAL ASSOCIATION OF MANUFACTURERS
"COUNCIL ON ENVIRONMENTAL QUALITY
AND NATIONAL ENVIRONMENTAL POLICY ACT"
BEFORE THE
SUBCOMMITTEE ON TOXIC SUBSTANCES AND ENVIRONMENTAL OVERSIGHT
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE
JULY 21, 1982

Introduction

I am Daniel W. Cannon and have been Director of Environmental Affairs of the National Association of Manufacturers during the life of the National Environmental Policy Act (NEPA) and the Council on Environmental Quality (CEQ). I am accompanied by Jan Amundson, Associate General Counsel of NAM. The Association is pleased to have the opportunity to testify at oversight hearings involving this legislation.

The National Association of Manufacturers is a voluntary association of some 11,000 enterprises engaged in manufacturing in the U. S. These enterprises account for 80 per cent of the goods manufactured in the U. S. and for 85 per cent of the jobs provided by U. S. manufacturing activities. An additional 158,000 companies are affiliated with NAM through its Associations Department and the National Industrial Council. The vast majority of NAM member companies and affiliated companies are in the small business category.

Environmental Impact Statements

NEPA requires federal agencies to prepare environmental impact statements (EIS) when proposing major federal actions which may have an impact on the human environment.

As a historical backdrop, I have attached to this testimony a copy of a presentation which I made on October 16, 1972, before the Water Resources Association of the Delaware River Basin entitled "National Strength and the National Environmental Policy Act." We have come a long way from those early days of NEPA when landmark litigation delayed the construction of the Alaska pipeline and the development of the U. S. nuclear power program. The departments and agencies of the federal government have become much more sophisticated in the preparation of environmental impact statements and have become expert in making them substantially, but not completely, unchallengeable by litigation.

Today, the big administrative challenge is to insure that paperwork and time delays are kept to a minimum while the marshalling of relevant facts and data and subsequent analyses are accelerated to the greatest possible degree consistent with sustainable conclusions.

The CEQ plays an indispensable role as a vehicle for channeling feedback from the regulated community to the departments and agencies of the federal government. This makes possible a process of continuing improvement in the implementation of NEPA.

We were very pleased when the CEQ published in the Federal

Register for August 14, 1981, a request for public comments on federal agency implementation of CEQ's NEPA regulations. A number of our member companies responded to this request. Likewise, we are pleased that the CEQ will hold a public meeting on August 12, 1982, to examine issues on which guidance from CEQ to the federal agencies is appropriate. Included are techniques for identifying issues to be analyzed in an EIS; agency adoption of analysis done by other federal and state agencies; and ways to reduce repetitious analyses in environmental documents.

Among the points made by our member companies are that decisive issues are not identified early enough in the process; data and analyses available from other federal agencies are not used; much paper is devoted to descriptive material rather than to analysis; duplication with state and local procedures is sometimes encountered; there is a need for more uniformity among the agencies; and there have sometimes been unfortunate and costly delays.

The EIS process is valuable in that it compels a thoughtful public consideration of environmental factors for relevant major activities. However, there needs to be a strong effort at continual improvement in the process. CEQ plays a key role in these efforts toward improvement.

Recommendation

Unfortunately, special interests can use the EIS process to foster indecision and to delay projects badly needed. An NAM member has pointed out litigation involving a number of

Outer Continental Shelf leasing sales, which resulted in delays of one to three years but with nothing of substance changed at the end of the litigation.

When NEPA was first enacted, many people thought it was merely a procedural law governing the internal activities of federal agencies, and that it conferred no substantive rights. However, it has obviously conferred a right to institute litigation which can have very damaging economic impacts, as pointed out in the attachment to this testimony. Therefore, we respectfully suggest to the Congress the consideration of an amendment to NEPA which would make CEQ the final arbiter of the sufficiency of environmental impact statements, rather than the courts. We believe that this would be a very constructive change, and would in no way diminish the beneficial aspects of NEPA. The EIS process has become firmly ingrained in agency decision-making. If there ever was any need for prolonged litigation, we submit that it no longer exists. The objectives of NEPA can continue to be accomplished to the fullest without resort to the courts.

We thank this distinguished Subcommittee for the opportunity to present our views on NEPA, and express our appreciation for its consideration of our recommendation.

PRESENTATION BY
DANIEL W. CANNON
DIRECTOR OF ENVIRONMENTAL AFFAIRS

NATIONAL ASSOCIATION OF MANUFACTURERS
BEFORE THE
WATER RESOURCES ASSOCIATION OF THE DELAWARE RIVER BASIN
BUCK HILL FALLS, PENNSYLVANIA
OCTOBER 16, 1972

NATIONAL STRENGTH AND THE NATIONAL ENVIRONMENTAL POLICY ACT

Ladies and gentlemen, meet an alarmist.

Paul Revere was an alarmist, and I am proud to join his ranks.

Paul Revere signaled the alarm that "The British are coming!"

Perhaps I am signaling the alarm that "The Arabs are coming!"

Not in the military sense, but in the sense of growing economic influence.

Projections have been made that, unless we in the United States vigorously develop domestic energy resources, we will be forced within less than 15 years to import 50 per cent of our total energy supply in the form of foreign crude oil and foreign liquefied natural gas.

The result would be a $25 billion per year deficit in our balance of payments. No one has fully assessed the impact such an annual

deficit would have on the United States economy. No one has fully assessed the economic leverage which would be afforded to the beneficiaries of such an imbalance.

Another aspect would be the extreme dependence of the United States economy on foreign energy sources and its extreme vulnerability if supplies from such sources were cut off due to political or military developments. Senator George McGovern has recently advocated that we should consider buying foreign oil and storing it in old oil-fields "as a hedge against international blackmail and interruption of supply."

Without belaboring the point, I do wish to point out that, by encouraging high per capita energy utilization, a nation is pursuing the most humanitarian of policies. The role of energy in freeing both the laborer and the housewife from manual drudgery is too often taken for granted, as is its role in increasing the productivity and thereby the real income of the individual and the nation. Statistics indicate the definite correlation, nation by nation, of per capita energy utilization with individual well-being.

What does this have to do with the National Environmental Policy Act? Plenty.

Now that I have your attention, hopefully, I will briefly discuss in the above context application of the Act in regard to the

Trans-Alaska Pipeline, oil and gas leasing in the Gulf of Mexico, and nuclear power development.

Nobody could quarrel with the stated policy in NEPA, as it is commonly referred to, "to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."

Nobody has been more diligent than representatives of industry in pointing out that the Federal Government is a major polluter in many locations, and nobody could object to a procedure insuring that environmental factors are taken into consideration in Federal decision-making.

The big difficulty arises out of NEPA's requirement of a detailed environmental impact statement "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment," and the extent to which the adequacy of the statement can be subjected to the independent judgment of the Federal courts at the instance of those who wish to stop or interminably delay a private enterprise project requiring a Federal permit, license, lease, or right of way.

As pointed out on August 15 by Judge Hart of the U. S. District Court of the District of Columbia, in Wilderness Society v.

Morton, cases involving the adequacy of the final Environmental Impact Statement for the proposed Trans-Alaska Pipeline:

"These cases have now been pending for more than two years. The matters involved are of very great importance to all the people of this country. ...

"It can be confidently anticipated that the final decision in this matter rests with the Supreme Court of the United States. It is deemed imperative that the appellate process be initiated as soon as possible. In view of this situation, and the tremendous costs involved, this Court will not delay this matter by detailed findings of fact that are undisputed, nor by an exhaustive legal opinion which would require weeks and months to complete.

"This Court will make only the necessary findings and conclusions to properly dispose of these cases in this court and to start them on the appellate road."

Judge Hart found that the statement reasonably sets forth the project's environmental impact; reasonably sets forth the adverse environmental effects which cannot be avoided if the proposal is implemented; reasonably sets forth alternatives to the proposed project; reasonably sets forth the relationship between local short-term use of man's environment and enhancement of long-term productivity; reasonably sets forth any irreversible and

irretrievable commitment of resources which would be involved in the proposed project if implemented; reasonably sets forth conflicting views on the project; and complies with Council of Environmental Quality guidelines and requirements of the National Environmental Policy Act.

Judge Hart dissolved the injunction previously issued against the project, but true to his prediction an appeal to the Court of Appeals for the District of Columbia was argued before the court 10 days ago. The Justice Department attorney said that it was imperative that the nation get Alaskan oil within a few years, but it would take 3-5 years to even get construction started on a pipeline through Canada, which has been suggested as an alternative. Meanwhile, on to the Supreme Court.

Additional development of domestic oil and gas resources was also delayed by the decision of the U. S. District Court for the District of Columbia in Natural Resources Defense Council v. Morton that the environmental impact statement in connection with proposed Federal oil and gas leases in the Gulf of Mexico was inadequate. The court held that the Department of the Interior had to consider alternatives which might require legislative implementation and which might involve factors such as national security which was beyond the Department's competence. In particular, the major inadequacy cited was failure to consider the alternative of modifying the oil import quota system, which to my mind completely misses the most important consideration of

all. The exact scope of judicial evaluation of the environmental impact statement is still somewhat obscure. For example, the U. S. District Court for the Northern District of Mississippi, while holding in Environmental Defense Fund v. Corps of Engineers, involving the Tennessee-Tombigbee Waterway, that NEPA does not create a substantive right of action under which environmental groups can challenge the wisdom and correctness of the Corps of Engineers' decision to construct the Waterway, but only establishes procedural remedies designed to insure disclosure of the project's environmental effects, nevertheless went on to examine the question of whether the failure to consider possible adverse effects on the shovelnose sturgeon, blue sucker, river redhorse, freckled-bellied madtom, speckled chub, river darter and freckled darter was fatal to this third of a billion dollar project.

Caveat Delaware River Basin Commission!

One means to lessen our future reliance on foreign fossil fuels would be the rapid development of domestic nuclear power generating capacity. However, this approach has also been slowed down by application of NEPA. This takes us back to the granddaddy of all NEPA court decisions, Calvert Cliffs Coordinating Committee v. U. S. Atomic Energy Commission, a decision by the Court of Appeals for the District of Columbia which laid down quite rigorous procedural requirements for the Atomic Energy Commission to comply with in connection with

granting licenses for nuclear power stations. This decision had the effect of putting a rather screeching brake on nuclear power development in the United States. It was acquiesced in by the Atomic Energy Commission which then proceeded to adopt very time-consuming procedures in these matters. An effort to appeal the decision to the United States Supreme Court by one electric company was denied. The Senate Interior Committee has now released a report which states that the decision and its subsequent implementation has introduced a delay of as much as a year to the total time required to bring a large nuclear powerplant into operation. For the short term, it appeared in 1971 that Calvert Cliffs potentially affected seventeen large nuclear powerplants, of which seven were virtually ready for operation.

It is obvious that Congress must reevaluate the National Environmental Policy Act. In fact, this reevaluation has already commenced. The Congress has already passed bills to authorize the issuance of temporary operating licenses for nuclear powerplants, which became Public Law 92-307 on June 2, 1972.

The Congress has also taken cognizance of the decision in Kalur v. Resor, in which it was held that the Corps of Engineers must prepare and circulate a detailed environmental impact statement for each one of 20,000 wastewater discharge permit applications filed pursuant to the Refuse Act of 1899, and this had the effect of shutting down the entire permit program. In water pollution

control legislation passed by the Senate and House this month, there would be an exemption from the NEPA requirements for the issuance of the wastewater discharge permits. Other bills have been introduced which are likewise intended to eliminate the paper work and delay involved with NEPA requirements.

I believe that Congress should take a totally new look at NEPA in an effort to prevent it from becoming a bureaucratic nightmare that would become the Achilles heel of our national strength. One remedy might be to make the Council on Environmental Quality the final arbiter of the adequacy of environmental impact statements, rather than the Federal courts.

Otherwise, we may have a result that would exceed our wildest Arabian dreams.

Shell Oil Company

One Shell Plaza
P.O. Box 4320
Houston, Texas 77210

November 12, 1981

General Counsel
ATTN NEPA Regulations Oversight
Council on Environmental Quality
722 Jackson Place, Northwest
Washington, D.C. 20006

Gentlemen:

The Shell Oil Company is pleased to submit comment in response to CEQ's published request of August 14, 1981. We are appreciative of the Council's efforts to make EIS procedures more workable and we encourage your critical re-appraisal of those procedures and practices which result in unnecessary delays and costs. While we are supportive of the EIS concept, we very much believe that EIS procedures should address real environmental issues only, and preclude matters which are not significant to agency decision making.

Over the past decade, Shell has expended considerable resources in the preparation of environmental documents required for compliance with NEPA. We have also experienced unfortunate and costly delay related to agency procedures. Thus, we are very supportive of procedural changes which promise to reduce delay, duplication and cost. At the same time, it is our strong conviction that procedural changes alone cannot adequately address the basic problems inherent in NEPA itself. Accordingly, we also include comment suggesting revision to the Act.

Our comments in response to your specific questions are largely based on recent experience with the Bureau of Land Management as Lead Agency in the EIS procedure. The problems encountered could well be common to other agency's procedures as well.

Question 1 - Usefulness of Scoping

In our experience with BLM, public scoping meetings have been poorly attended and are usually non-productive in surfacing controversial issues. The language in scoping notices, we believe, provides little impetus for parties to come forth with issues. Typical language is "...issues to be addressed in the EIS, may be presented in writing or orally at three scheduled scoping meetings"[1] [emphasis added]. We suggest that the scoping process would become more effective if the notice included a statement such as the following: "If interested

parties do not use this opportunity to raise an issue, they will find that their efforts to raise the issue at a later stage will not be persuasive to the lead agency." This approach is consistent with CEQ's mandate to reduce paperwork (CEQ 1500.4g) and statements in CEQ guidance documents.[3]

We wish to note that BLM as a lead agency, has been effective in contacting affected states, governors' offices, environmental groups and industry to identify specific concerns which must be addressed. The Regional Technical Working Groups established by the BLM have been particularly valuable with regard to the states' concerns.

Question 3 - Tiering

The Shell Oil Company strongly supports the concept of the Regional Program Plan and EIS proposed by the BLM as a method of expediting oil and gas development on the Outer Continental Shelf in the Gulf of Mexico. Much of the information covered in prior EIS's for Outer Continental Shelf sales in the Gulf has been regional in scope. The approach proposed by the BLM would avoid unnecessary repetition, and those items unique to specific tracts could be handled in the Environmental Assessment Document. As the data base is established for frontier areas, consideration should be given to expanding this concept. Other agencies should consider this BLM concept.

The USGS has recently proposed[4] additional flexibility for preparing the Environmental Reports which are submitted in conjunction with Exploration Plans and Development and Production Plans filed by lessees operating on the OCS. This proposal would allow incorporation by reference in the Enviornmental Report of data discussed in other documents, i.e., the tiering concept applied to Environmental Reports.

Question 6 - Integrating Environmental Documents With Other Analyses

The New Orleans BLM Office has reduced the size of recent EIS's by referencing open files on specific subjects. Examples of such files include those concerning: (1) Deep Water Technology; (2) Unstable Bottoms Study; and (3) Recreational Use Study. While these examples are specific to BLM, other agencies should adopt this approach.

Question 7 - Duplication With State Requirements

Duplication with state requirements by BLM in the Gulf of Mexico Outer Continental Shelf (OCS) has not been a problem. However, in the North Atlantic, the presale EIS did not adequately address all of the concerns of the states. It then became necessary to develop an expanded Environmental Report which accompanied the tract-specific Plans of Exploration.

Question 9 - Eliminating Delays

We are seriously concerned regarding the lengthy and costly delays encountered in agency implementation of NEPA procedures. In our experience, much of this delay appears to result from inadequate staffing at the office charged with the responsibility of executing the agency's procedures. As an example of the delays that can occur when a state office is not adequately prepared, we have listed the chronology for a recently completed application in the attachment to this correspondence. The project involved laying a carbon dioxide pipeline from Southwestern Colorado through New Mexico to West Texas. The EIS process from the first meeting with BLM to issuance of the final decision took four years. CEQ's guidance to agencies state that even for a major energy project only about 12 months should be required.[5]

We attribute much of the above delay to the absence of a team with necessary expertise in the New Mexico BLM office. Although a team is now in place, we understand that it is soon to be disbanded. The Regulations of CEQ (1501.2d1), DOI (516 DM 6.2B) and BLM (516 DM Appendix 5.1D) all specify that designated staff be available and we urge that capability by responsible agencies to expeditiously implement EIS procedures be assured.

It is also our opinion that delays ought to be reduced if agency procedures included deadlines for agency actions at each step of the environmental impact process. For instance, EPA's procedures for involving the public and other agencies (Subpart D) require that the responsible official not take action for at least 30 days after release of a Finding of No Significant Impact and allows for provision of more time at his discretion. Similarly, administrative decision is prohibited by the 45-day and 30-day review periods for draft and final EIS review and the period may be extended at agency discretion. This kind of openendedness inevitably leads to delays. We strongly recommend that firm deadlines be set requiring agency actions at each step of the EIS process. In the above instances, the deadline might require administrative decision within five days of the close of the period.

Question 11 - Day-To-Day Agency Practices

We reviewed ten agency regulations implementing NEPA procedures and CEQ's regulations. We failed to find a needed mechanism for resolving conflict during the EIS process between an applicant and the working level official responsible for the EIS. A mechanism does exist for referring disputes between agencies to the CEQ (CEQ 1504). We suggest that procedures be established to allow an applicant opportunity to present his case to higher agency authority, such as EPA's Office of Environmental Review or if necessary to the CEQ.

We also believe that intragency coordination needs to be improved. For example, following issuance of the record of decision for the pipeline right of way application previously discussed under Question 9, BLM proposed costly stipulations that could have been avoided with adequate internal BLM review. Local area BLM representatives had ample opportunity to comment during earlier stages of the EIS process. It was not until after the final EIS was issued, however, that local representatives surfaced concerns that demanded pipeline relocation from routes clearly described in earlier environmental documents. Nothing had changed in the areas of concern along the route since the first meeting with BLM four years earlier so these issues could have been raised and resolved earlier to avoid additional paperwork and delay.

This completes our response to your specific questions. Now we would like to discuss NEPA. A decade's experience with the Act clearly demonstrates the substantial problems inherent in the Act itself.

NEPA moved through Congress with little notice. The appropriate Senate committee held only one day's hearing on the bill; the House held none. Furthermore, the all-important section 102(2)(c) was incorporated in the bill by the House-Senate Conference Committee. The paucity of legislative history, the broad language of this 2000-word enactment, and the lack of sanctions in the Act combine to produce a blunt instrument without instruction as to its use. It was left for the courts to discover Congressional intent, and it was left for the courts to fashion the procedural framework to guide EIS preparation. The courts have had ample opportunities to do so via the hundreds of lawsuits alleging violations in NEPA's EIS requirements.

Alleging that a particular EIS is deficient is easy because human experience and knowledge are not complete. Despite a most far-reaching and imaginative EIS, it is possible to identify in it some potentiality which was not discussed, or which was discussed in less-than-maximum detail. It is these gaps in the EIS, whether real or not, that the EIS litigant has challenged. In essence, NEPA's enforcement is entrusted to the courts and the result has been a preoccupation with procedure and a neglect of substance.

On average, more than 1000 EIS's are written annually and about one EIS out of every ten is challenged in court. Many decisions have been appealed, a few as far as the Supreme Court of the United States. Litigation involving the development or transportation of oil or coal resources has been relatively infrequent, but looms large in importance due to the impact of such lawsuits on our energy needs.

Perhaps the best-known case of this type is the dispute over the trans-Alaska oil pipeline from Prudhoe Bay to Valdez. The Secretary of the Interior granted construction permits for the line a few months after NEPA was signed into law and a prompt challenge by the Wilderness Society

resulted in an April 23, 1970, preliminary injunction against the permits. The litigation reached the appeals court which decided the case on non-EIS grounds in February, 1973. This dispute generated an EIS of heroic size but further litigation concerning its adequacy became rhetorical with the passage of the Trans-Alaksa Pipeline Authorization Law of 1973, an act which barred further court review of the EIS.

Outer Continental Shelf (OCS) lease sales, although relative few in number, are of major importance to the oil industry and of our society's domestic energy supply. Such sales often are challenged on EIS grounds The earliest litigation of this type to reach the appellate level is styled NRDC v. Morton and was decided by the D.C. Circuit Court of Appeals in 1972. This lease auction involved tracts of submerged lands in a portion of the Gulf of Mexico adjacent to Louisiana. The sale, planned for late 1971, was in response to a Presidential energy message which called for greater domestic oil exploration and production. After about a year's delay due to litigation, the sale was ultimately held.

A similar OCS leasing controversy is represented by the confrontations associated with Department of the Interior (DOI) Lease Sale No. 40 located 50 to 90 miles east of Atlantic City, New Jersey. This complex litigation had its origins in a 1974 Presidential directive for an accelerated OCS leasing program designed to help alleviate the growing shortage of domestic petroleum. In August of 1975, DOI announced tentative tract selections in the so-called "Baltimore Canyon;" a final EIS was released in May of 1976 and the auction ws set for August 17, 1976.

Before the sale could be held, several motions for injunctions were filed on EIS grounds and a preliminary injunction was issued on August 13, 1976. Litigation on this matter lasted until February 21, 1978, when the lease sale was finally determined to be valid.

Litigation similar to the Baltimore Canyon controversy arose in connection with OCS Lease Sale No. 42 in the Georges Bank area east and southeast of Nantucket Island. This sale initially was scheduled for January 31, 1978, but it was enjoined a few days prior to that date. After a two-year delay, the auction was held. Exploratory drilling on the Georges Bank commenced during the late summer of 1981.

The situation onshore with respect to coal reserves on federal lands in the western U.S. is similar. A series of strip mines in Wyoming, Montana, Colorado, North Dakota and South Dakota was proposed in order to exploit seams of low-sulfur coal lying near the surface. In June of 1973, the Sierra Club and six other organizations filed suit challenging the activities of the Departments of the Interior, Agriculture and the Army. Litigation progressed to the U.S. Supreme Court which finally resolved the matter in 1976.

These examples, chosen from the array of appellate decisions involving EIS's, demonstrate major impacts on OCS leasing activities, on pipeline construction, and on low-sulfur coal development. NEPA creates the EIS

as a management tool and decrees that this tool be used in the decision-making process. These examples demonstrate that special interests can use the EIS process to foster indecision and delay energy-related projects needed by society. Despite delays of one to three years, these examples show that nothing of subtance changed: the leases were held and the energy projects proceeded. A

The costs which this nation bears for such delays are formidible. We need domestic oil as shown by the annual costs for imported crude: $78.6 billion in 1980; $32 billion in 1976. The delays are costly in other respects as well. For the Baltimore Canyon Lease Sale, the government accepted bids that totaled $1.1 billion. Calculated at eight percent (a conservative rate for such a financially risky venture), the interest charges for the industry amounted to $1.7 million per week during the delays caused by EIS litigation. In addition, standby costs for contracted drilling rigs amounted to many tens of thousands of dollars per day.

The EIS process is valuable in that it compels a thoughtful public consideration of environmental factors for relevant major activities. However, CEQ should be mindful that the process can be used to impede necessary projects and CEQ, we suggest strongly, should recommend changes in NEPA to minimize such delaying tactics.

We appreciate this opportunity to assist you in your efforts to identify possible methods by which the goals of NEPA can be more precisely and expeditiously accomplished and hope that our comments will be helpful.

Sincerely,

A. G. Smith, Manager
Environmental Affairs

TMC:hg

Attachment

ATTACHMENT

CHRONOLOGY OF EIS PROCESS FOR A CARBON DIOXIDE PIPELINE RIGHT OF WAY APPLICATION

May 1976	First meeting with BLM
October 1976	Filed preliminary BLM right of way application
March 1977	Contracted with consulting firm for preparation of the Environmental Assessment (EA)
May 1977	Met with BLM in Washington, D.C., and established that BLM act as the lead agency
Fall 1977	BLM agreed to prepare an EIS Preparation Plan
February 1978	BLM advised Shell that impacts of another company's carbon dioxide field must be included in the EA
Spring 1978	Draft EA completed with federal review and input
July 1978	Final EA filed with BLM
Winter 1978	Consulting firm drafted document to be reviewed for compliance with Section 106 of the National Historic Preservation Act. BLM elected not to finalize this document.
	BLM and consulting firm prepared preliminary draft EIS.
Spring 1978	Preliminary draft EIS approved and printed
July 1979	Draft EIS issued for public comment
Fall 1979	Public hearings held on draft EIS
Winter 1979	U.S. Fish and Wildlife Service requested consultation concerning impacts on the pecos gambusia and the black footed ferret
February 1980	Final EIS issued
Spring 1980	Meetings held to consider proposed stipulations for BLM grant of right of way
Summer 1980	BLM record of decision issued. Proposed stipulations were issued and Shell filed comments.

December 1980	New Mexico right of way grant was issued. Cultural resources and endangered species stipulations were appealed.
Spring 1981	Portions of the relocation demands surfaced by BLM Resource Area representatives were resolved.
Summer 1981	Remaining relocation demand to by-pass a potential coal mining area was agreed upon. Colorado right of way grant was issued. Construction/Operation Plan was accepted. Archaeological stipulations were issued and appealed.

FOOTNOTES

[1]46 FR 44890 of September 8, 1981

[2]"Memorandum to Agencies Containing Scoping Guidance" April 30, 1981, pages 3 and 17.

[3]"40 Questions and Answers About the NEPA Regulations," 46 FR 18026, March 23, 1981, Questions 14d and 29b.

[4]46 FR 48951, October 5, 1981

[5]"40 Questions and Answers About the NEPA Regulations," 46 FR 18026, March 23, 1981, Question 35.

WADE v. GOLDSCHMIDT

U.S. Court of Appeals
Seventh Circuit

SAM WADE and JULIET WADE, Plaintiffs-Appellees, v. NEIL GOLDSCHMIDT, Secretary of the U.S. Dept. of Transportation, et al., Defendants; Appeal of AMPS, INC., et al., Applicants for Intervention, No. 81-2805, submitted January 26, 1982,* decided February 1, 1982**

LAND

Court jurisdiction and procedure — Parties — In general (§15.211)

[1] Individuals asserting economic, personal, environmental, and safety interests in proposed expressway and bridge construction project, who seek to intervene as defendants in suit which alleges that governmental bodies violated procedural duties under National Environmental Policy Act, Federal-Aid Highway Act and other federal statutes, do not meet requirements of intervention of right under Rule 24(a)(2) of Federal Rules of Civil Procedure, since only governmental defendants have interest in challenged government action and individuals can assure their rights are represented without intervening in suit.

Court jurisdiction and procedure — Parties — In general (§15.211)

[2] Individuals asserting personal, economic, environmental, and safety interests in proposed expressway and bridge construction project, who seek to intervene as defendants in suit which alleges that governmental bodies violated procedural duties under National Environmental Policy Act, Federal-Aid Highway Act and other federal statutes, do not meet requirements for permissive intervention under Rule 24(b)(2) of Federal Rules of Civil Procedure, since interests of individuals do not have question of law or fact in common with claims of procedural violations brought against governmental defendants.

STATUTES

Federal — National Environmental Policy Act — In general (§95.0111)

Federal — Federal-Aid Highway Act (§95.051)

Construed.

Individuals appeal order of U.S. District Court for the Northern District of Illinois (No. 80-C-3072, Hubert L. Will, J.) denying their motion for intervention as defendants in suit brought against governmental bodies; affirmed.

David Lincoln Ader and Wayne W. Whalen, Chicago, Ill., for plaintiffs.

Kenneth G. Anspach, Office of Ill. Attorney General, and Frederick H. Branding, Assistant U.S. Attorney, Chicago, Ill., for defendants.

Full Text of Opinion

Before Sprecher, Circuit Judge, Cudahy, Circuit Judge,*** and Eschbach, Circuit Judge.

PER CURIAM.

I

The defendants in this suit are the United States Department of Transportation and the State of Illinois.[1] Plaintiffs allege that defendants' action, relating to the proposed construction of the 35 million dollar Central Illinois Expressway and a bridge across the Illinois River, exceeded their authority. Plaintiffs seek declaratory and injunctive relief. Plaintiffs' amended complaint: 1) challenges the use of federal funds for the construction of the proposed bridge, under the Highway Bridge Replacement and Rehabilitation Program, 23 C.F.R. §650.405; 2) alleges that a proper Environmental Impact Statement was not prepared, thus violating the National

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* Applicants have submitted a motion to this Court for an immediate submission of this case and expedited decision without oral argument. Appellees responded in opposition to applicants' motion, and have requested oral argument. Upon consideration of applicants' motion, appellees' response, the briefs, and the record, the request for oral argument is denied and the appeal is submitted on the briefs and record.

** This appeal was originally decided by an unpublished order on February 1, 1982, pursuant to Circuit Rule 35. The Court has subsequently decided to issue the decision as an opinion.

*** Judge Richard D. Cudahy respectfully dissents.

[1] The State of Illinois was permitted to intervene as a defendant seven days after plaintiffs filed their original complaint.

Environmental Policy Act [NEPA], 42 U.S.C. §4331(b), the Federal-Aid Highway Act, 23 U.S.C. §§109, 138, 23 C.F.R. §771.5, and the Federal Department of Transportation Act, 49 U.S.C. §1653(f); 3) alleges that the bridge project violates the Federal Department of Transportation Act, 49 U.S.C. §1651, and the Federal-Aid Highway Act, 23 U.S.C. §138 as the proposed construction site involves an area of plaintiffs' farm eligible for inclusion in the National Register of Historic Places and involves a state conservation area, and there are prudent alternatives to the proposed construction site which would cause less environmental damage; and 4) alleges that the project would endanger migratory birds found on plaintiffs' farm and in the conservation area, in violation of a U.S.-Japan Treaty, 25 U.S.T. 3329.

The district court granted a temporary restraining order and later a preliminary injunction enjoining the defendants from awarding a contract for construction of the proposed bridge. The trial date has been set for February 22, 1982.

II

In this appeal we review the district court's denial of the proposed intervenors'[2] motion to intervene as defendants. The district court's order denying intervention as of right and denying permissive intervention is appealable.[3] *E.E.O.C. v. United Airlines, Inc.*, 515 F.2d 946, 949 (7th Cir. 1975).

It is critical to the determination of the propriety of granting a motion to intervene for us to crystalize the relevant scope of the trial in which applicants seek to intervene. Our review of an intervention order does not involve an examination of the theoretical interests of proposed intervenors that would justify the initiation or the defense of a lawsuit in appropriate circumstances. "In the context of intervention the question is not whether a lawsuit should be begun [or defended], but whether already initiated litigation should be extended to include additional parties." *Smuck v. Hobson*, 408 F.2d 175, 179 (D.C. Cir. 1969).

The essence of plaintiffs' amended complaint is that the defendants violated applicable federal requirements which impose on federal agencies essentially procedural duties. Given the posture of this case "once an agency has made a decision subject to NEPA's procedural requirements [as well as those of the other federal statutes relied on by the plaintiffs], the only role for a court is to insure that the agency has considered the environmental consequences." *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227 [13 ERC 2157] (1980). As the Supreme Court has emphasized "NEPA was designed 'to insure a fully informed and well considered decision,' but not necessarily 'a decision the judges of the Court of Appeals or of this Court would have reached had they been members of the decision making unit of the agency.' . . . [The Court] cannot '"interject itself within the area of discretion of the executive as to the choice of the action to be taken."'" *Id.* at 227-28 (citation omitted).

In the proceedings pending before the lower court, the record clearly indicates that the district court recognizes that its role in reviewing the Federal Department of Transportation decision is defined by the Administrative Procedure Act (APA), 5 U.S.C. §706(2)(A), which provides that agency action should be set aside if found to be "arbitrary, capricious, or abuse of discretion or otherwise not in accordance with law . . . ." The district court recognizes that it may not decide where the funded highway and bridge will eventually be constructed. Rather, the issue is narrowly circumscribed, namely: did the agency abide by the statutory procedural requirements in reaching its decision? If procedural requirements were followed then the agency will be permitted to implement the project as proposed. If the statutory requirements were not followed then the agency, not the courts, will be required to make a determination as to the place of construction of the project, after fully abiding by the statutorily required procedural requirements.

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[2] The proposed intervenors are: AMPS, Inc., an Illinois non-profit corporation formed specifically to support construction of the proposed Bridge and Expressway; Pike County located in the State of Illinois; the cities of Quincy, Jacksonville and Griggsville located in the State of Illinois; Flint Township located in Pike County, Illinois; four families who allege a benefit from the proposed project or fear damage if an alternate route is chosen for the project; and a Missouri corporation doing business in Pike County, Illinois.

[3] Defendants have no objection to applicants' intervention. This is not dispositive however, because consent of a party does not entitle one to intervention as a matter of right, or to permissive intervention.

III

With the foregoing in mind we now proceed to examine whether applicants met the requirements for intervention of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure.[4] Clause 2 of Rule 24(a) permits intervention of right: [1] upon timely application, [2] "when the applicant claims an interest relating to the property or transaction which is the subject of the action and [3] he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, [4] unless the applicant's interest is adequately represented by existing parties."

Initially we will focus on the nature of the interests asserted by proposed intervenors because their consideration is relevant to much of Rule 24(a)(2) analysis. Proposed intervenors allege: economic interests in the reduction of cost to local farmers and businesses which would result if the project were to be constructed on the location originally proposed; personal and environmental interests because, it is argued, that "[rerouting] of the bridge would triangularly bisect farms making them substantially more difficult to cultivate and wasting valuable farm land, disrupt already established drainage districts, and destroy environmentally significant land belonging to applicants"; safety interests because the existing bridge is extremely dangerous (Applicants' *Reply Brief* at 4-5).

[1] Rule 24(a)(2) requires a direct, significant legally protectable interest in the property or transaction subject to the action. *Donaldson v. United States*, 400 U.S. 517, 531 (1971); *Airlines Stewards, Etc. v. American Airlines, Inc.*, 455 F.2d 101, 105 (7th Cir. 1972), *later app.*, 490 F.2d 636 (7th Cir. 1973), *cert. denied, Airlines Stewards, Etc. v. Zipes*, 416 U.S. 993 (1974). None of the actions taken, nor the statutory authority called into question in this case, involves the proposed intervenors who seek to intervene as defendants. The only interest involved is of the named defendants, governmental bodies. As we emphasized in Part II the only focus that the ongoing litigation in the district court can have is whether the governmental bodies charged with compliance, defendants, have satisfied the federal statutory procedural requirements in making the administrative decisions regarding the construction which would directly affect plaintiffs' property. In a suit such as this, brought to require compliance with federal statutes regulating governmental projects, the governmental bodies charged with compliance can be the only defendants. As to the determination involved in this suit, all other entities have no right to invervene as defendants. Thus we hold that the proposed intervenors' interests do not relate "to the property or transaction which is the subject of the action" and they have therefore failed to assert an interest in the lawsuit sufficient to warrant intervention as of right.[5] *See, Dodson v. Salvitti*, 77 F.R.D. 674, 675 (E.D. Pa. 1977); *Piedmont Heights Civic Club, Inc. v. Moreland*, 83 F.R.D. 153, 156 (N.D. Ga. 1979).

Because applicants fail to assert an interest relating to the property or transaction which is the subject of the action in the district court, it follows that applicants also have no direct legally protectable interest that could be impaired or impeded. As we have pointed out the decision on where this project will ultimately be built is for the executive department. The role of the courts is merely to determine if the statutory mandates of Congress were complied with. The ability of applicants to assert the economic, safety, and environmental interests they allege is not impeded nor impaired by refusal to grant them intervention. Applicants can present these interests to the governmental bodies, if these bodies are called upon again to determine a site for the proposed project. The defendants, governmental bodies, not the courts, are required by statute to evaluate and make decisions as to the priority of the various considerations. *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. at 228 n.2. And if a time comes when applicants determine that their alleged interests were not given the required statutory consideration, they can then bring suit, as plaintiffs, to compel defendants to follow the statutorily mandated procedures.[6]

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[4] All four requirements of Rule 24(a)(2) must be met before intervention of right will be allowed. *NAACP v. New York*, 413 U.S. 345, 369 (1973).

[5] "[A]n interest, to satisfy the requirements of Rule 24(a)(2) must be significant, must be direct rather than contingent, and must be based on a right which belongs to the proposed intervenor rather than to an existing party to the suit." *In Re Penn Cent. Commercial Paper Litigation*, 62 F.R.D. 341, 346 (S.D.N.Y. 1974), *aff'd* without opinion, *Shulman v. Goldman, Sachs, & Co.*, 515 F.2d 505 (2d Cir. 1975).

[6] *New York Public Interest Research Group, Inc. v.*

Since the adequacy of representation relates directly to the rights asserted by the plaintiffs and the rights and authority claimed by the defendants, our analysis of the issue and interests involved in this suit makes it obvious that applicants have no right to assert that their interests[7] are inadequately represented by the defendants.[8]

We hold that applicants have failed to satisfy the requirements for intervention of right.

IV

[2] We now turn to applicants' alternative request for permissive intervention under Rule 24(b)(2).[9] We have emphasized that the issue to be decided by the court below is whether or not the governmental defendants have complied with certain federal laws. Also, as we emphasized, the court below is not in a position to act on the questions raised by applicants involving basic value judgments as to the ultimate location of the proposed construction and the priority of the various interests that the governmental bodies are statutorily mandated to take into consideration. *Stryker's Bay Neighborhood Council v. Karlen*, 444 U.S. at 227-28. Thus, as it should be clear from our discussion of intervention of right it cannot be said that any of the applicants' claims of defenses and the present action have a question of law or fact in common as to satisfy[10] the requirement for permissive intervention pursuant to Rule 24(b)(2).[11] We hold that the trial court did not abuse its discretion in denying appellants' motion for permissive intervention.

V

For the foregoing reasons the order of the district court denying appellants' motion for intervention of right and permissive intervention is AFFIRMED.[12]

Regents of University of State of New York, 516 F.2d 350 (2d Cir. 1975), relied on by applicants is distinguishable. Unlike this case, the case relied on involved a suit whose result might have invalidated a regulation directly governing the proposed intervenors, thus giving them a sufficiently direct and substantial interest in the suit. By contrast, the holding in the instant case will not affect a statute or regulation governing the applicants' actions, nor will it directly alter contractual or other legally protectable rights of the proposed intervenors. *See Piedmont Heights Civic Club, Inc. v. Moreland*, 83 F.R.D. at 156-7.

[7] Even if we were to assume *arguendo* that applicants have a direct legally protectable interest, applicants have not overcome the presumption of adequacy of representation that arises when the proposed intervenor and a party to the suit (especially if it is the state) have the same ultimate objective. *Environmental Defense Fund v. Higginson*, 631 F.2d 738, 760 [13 ERC 1731] (D.C. Cir. 1979); *United States Postal Service v. Brennan*, 579 F.2d 188, 191 (2d Cir. 1978). Additionally it is clear that adequacy of representation is established when no collusion is shown between the representative and an opposing party, when the representative does not have or represent an interest adverse to the proposed intervenor, and when the representative has not failed in the fulfillment of his duty. *United States v. Board of School Comrs.*, 466 F.2d 573, 575 (7th Cir. 1972), *cert. denied, Citizens of Indianapolis for Quality Schools, Inc. v. United States*, 410 U.S. 909 (1973).

[8] Although it is unnecessary for the disposition of this appeal to consider the timeliness of applicants' motion, we note that there was an inordinate amount of time, between the applicants' knowledge of the interest that they now assert and their motion to intervene. Such delay seriously prejudices the existing parties. *E.E.O.C. v. United Airlines, Inc.*, 515 F.2d at 949.

[9] Rule 24(b) provides in pertinent part:

Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common . . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

[10] Applicants argue that permitting their intervention would do no harm since appellees are protected by a preliminary injunction. That argument ignores the requirements established by Congress for the management of lawsuits in the federal courts. As most eloquently stated: "The trend is toward justification of intervention upon incantation of the phrase 'it won't do any harm.' I respectfully submit that painting with such broad amorphous strokes absent an analysis of the hues and textures employed can only lead to a collage-cluttered canvas sans symmetry or perspective . . . . [W]e should be . . . wary, lest the manageable law-suit become an unmanageable cowlick." *Wilderness Soc'y v. Morton*, 463 F.2d 1261, 1263 [4 ERC 1101] (D.C. Cir. 1972) (Tamm, J. concurring).

[11] Furthermore there are serious concerns for delay and prejudice because all the relevant issues sought to be raised by applicants are already raised by the defendants, and applicants seek to raise other issues which are irrelevant to the legal issue confronting the district court.

[12] Normally our disposition of the case would make it unnecessary to address applicants' request for the reassignment of the case to a different judge pursuant to Circuit Rule 18. However, we believe that it is important for us to make clear that we find the trial court's handling of this complex case, including the motion of intervention, judicious and most commendable.